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Supreme Court of the United States

OCTOBER TERM, 1933

No. 80

LOUIS H. MAY, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA and ROYAL INDEMNITY COMPANY,
Petitioners,
against
HAMBURG-AMERIKANISCHE PACKETFAHRT AKTIENGESELLSCHAFT,
Respondent.

BRIEF FOR RESPONDENT.

Statement of Proceedings Below.

This case comes up on writ of certiorari to the Circuit Court of Appeals for the Second Circuit.

The libels were filed to recover back certain sums deposited with the respondent by owners of cargo on the steamship *Isis*, as security for general average contributions. It was alleged by the petitioners (R. 5) that the deposits had been exacted by duress. No evidence of this was offered. It is now conceded that the deposits were made in accordance with the usual maritime practice. Since the suit was started, the general average adjustment (Exhibit 16) has been completed and the amount of the cargo's contribution has thus been fixed. The excess security has been refunded, with interest (Stipulation, R. 20).

By consent, the issues were referred to an experienced member of the Admiralty Bar as Commissioner, "to hear the evidence adduced by the respective parties and to report his conclusions thereon to the Court" (R. 49). He filed a careful report (R. 499 to 536; 57 Fed. [2d] 265), holding that the libelants (petitioners here) were not entitled to recover.

The District Court (Judge Coleman), after re-examining the entire case, confirmed the Commissioner's report. His opinion is at R. 544-546 (57 Fed. [2d] 265, at 282). Thereupon a final decree was entered dismissing the libels (R. 546).

The Circuit Court of Appeals affirmed this decree. Its opinion is at R. 555-564 (63 Fed. [2d] 248).

Statement of Facts.

The respondent desires to supplement and correct the petitioners' statement of facts, as follows:

On sailing from her loading ports, the *Isis* had fulfilled the conditions of Section 3 of the Harter Act, as well as the identical conditions of the bill of lading "Jason" clause, in that she was in all respects seaworthy and properly manned, equipped and supplied. This was found by both Courts below and is not disputed here.

While proceeding up the River Weser to Bremen, on February 6, 1928, the *Isis* was anchored because of fog and, some hours later, her stern was blown by a strong wind against the river bank. This twisted her rudder stock (the upright stem of the rudder above the rudder blade) about 45 degrees, with the result that, when her helm was put amidships, her rudder was over to starboard.

At first the precise character of the damage was not known, but, as the vessel proceeded up the river, assisted by tugs, it was noticed that, when the helm was amidships, she tended to go to starboard, as she naturally would. On arrival at Bremen, she discharged the cargo destined for that port.

The cargo interests admit liability to contribute in the general average growing out of this stranding.

After arrival at Bremen, it was ascertained that her rudder stock was twisted, as already described. The rudder itself was examined by a diver and found to be straight; but, by way of extra precaution, the vessel was placed on dry dock and the water was pumped down as far as could safely be done with cargo on board. In fact, it was pumped down so as to expose all but about 3½ feet of the rudder, which was some 18 feet high (see pp. 24-25, *infra*).

A careful inspection was then made, not only by the master, but by four other competent men. The rudder was found to be perfectly straight down to the water line, and the remaining 3½ feet were examined by hand and by searchlight and tested by applying a straight edge. This test showed the rudder to be straight throughout its entire length (pp. 24-25, *infra*).

A practical question was then presented, whether to discharge cargo at Bremen, to repair the rudder stock there, and then to reload the cargo, thus incurring considerable general average expenses; or to send the ship on to Hamburg, where nearly all of her remaining cargo was destined, with the assistance of tugs.

Economy in avoiding general average expenses was far more important to the cargo than to the owners of the *Isis*. The contributory value of the *Isis* was only $223,879, whereas that of the cargo was $924,996 (see General Average Adjustment, Exhibit 16). The owners of the *Isis* therefore would have paid only one-fifth of the general average expenses incurred in Bremen, if the cargo had been discharged and the ship repaired there; whereas, four-fifths would have fallen on the cargo.

The expense of repairing in Bremen, and the delay involved for the cargo, were obvious. No dock was then available and it was impossible to ascertain when one would be free (Reichenbacher, R. 172). The repairs themselves would have taken about two weeks (R. 166). All of the practical men who examined the ship considered that would have been necessary to discharge most of the cargo on board before it

would have been safe to pump the dock dry in order to effect repairs (R. 171-173, 382). This would have involved heavy expense for discharging, storing, reloading and insuring the cargo.

The master and the surveyors thought it best, in order to save time and to avoid these expenses, to lash the rudder amidships, to send the vessel from Bremen to Hamburg with the assistance of tugs, and to deliver the cargo before repairs were made. This course would avoid practically all delay to the cargo, and would effect some saving in expenses for the ship and four times as much saving for the cargo.

Before a decision was reached, however, the Hamburg Underwriters Association was consulted. Its members carried all of the hull insurance (Warns, R. 249) and a considerable part of the cargo insurance (R. 141-142, 146, 152). The facts were laid before the Association's Average Committee, in whose hands such matters rest and whom it is the practice in Hamburg to consult in such cases (Brandt, R. 143). The Average Committee approved of sending the *Isis* to Hamburg, assisted by *two* tugs (R. 141, 150). The cargo underwriters who are interested in the case at bar were not available for consultation and claim that they are not bound to follow the other underwriters, though the practice is for all underwriters to follow the decision of those who have been consulted (R. 142-143).

The Chief Surveyor of Germanischer Lloyds, the association in which the ship was classed, was also consulted and he gave his approval (R. 161). Since it was then late, he did not actually sign a certificate of seaworthiness, but agreed to do so the next day (R. 161, 169). The petitioners' contention that the ship sailed without a certificate of seaworthiness is, therefore, in reality incorrect.

Accordingly, it was decided to follow this course "to save time and to save expenses and to do the best for everybody" (Reichenbacher, R. 172; see pp. 37-39, *infra*).

The rudder was lashed firmly amidships and the rudder quadrant was screwed down so that the rudder was immovably fixed in that position. Not two, but three, tugs were engaged. They were very powerful, having an aggregate of

2,690 horsepower, more than the power of the ship's own engines. The *Isis* was a twin-screw vessel, and her engines were in perfect condition, so that she could navigate under her own power as usual, and she also had steering power from her twin screws. The tugs were made fast, one on each quarter and one ahead, and the evidence is that, with the tugs so secured, the *Isis* had better steering capacity than her own rudder would have given her (pp. 29-30, *infra*).

The hour of sailing was fixed by the Chief Pilot of the port of Bremen as about 1 A. M. on the night of February 9th-10th (R. 161). This time was selected by him because at night the traffic was less and because the tide was flood—giving, of course, the best steering conditions for going down the river. The river was abundantly lighted along both banks and the night in question was clear, with moonlight. The vessel was in charge of a river pilot, who has since died and whose testimony, therefore, could not be secured. This pilot was selected by the Chief Pilot. He was a man of great experience and was recommended by the Chief Pilot (R. 161). The masters of the tugs were very familiar with such work (R. 177). The petitioners are in error in saying (brief, p 49) that there was no evidence that the navigators were competent.

The *Isis* proceeded for a number of miles, rounding the curves of the river in both directions and passing a number of vessels, without the slightest difficulty in steering (pp. 32-33, *infra*). Somewhat above the point where the River Lesum enters the Weser on the starboard side, the *Isis* sighted, at a considerable distance down the river, another steamer coming up. Just above the mouth of the Lesum the river curves to port. Instead of waiting and passing the steamer in the straight reach of the river, as he could and should have done (Appendix A, p. III, *infra*), the pilot of the *Isis* kept going, met the other steamer at the curve, and, in order to pass, swung the *Isis* to her own starboard, bringing her close up to the bank of the river channel. The effect of this was two-fold. Because the river begins to bend to port at that point, the flood tide, setting up the river, caught the *Isis*

on the port bow (R. 66); also, she was thus brought too close to the starboard bank and "smelled" it. The result of these two circumstances was that her bow sheered to starboard and she got so near the bank on that side that the starboard tug was forced to cast off, thus depriving her of its steering power. She passed so close to the buoy near the mouth of the Lesum that her starboard propeller could not be used, for fear of entangling it with the buoy and its chain. Therefore, as she reached the confluence of the Weser and the Lesum, she encountered the force of the current setting up the Lesum on her port bow at a time when she was smelling the bank and when her starboard tug and her starboard propeller had been rendered useless. Under these conditions, the sheer could not be overcome, and the *Isis* stranded across the point of land separating the Lesum from the Weser. This necessitated the general average sacrifices now in question.

As the Commissioner and both courts below found, this accident was due solely to the negligent navigation of the pilot (Appendix A, pp. I-IV, *infra*).

Testimony was taken in Hamburg from the witnesses who had examined the *Isis* in drydock and from a number of other navigators familiar with the river, all of whom testified that the *Isis* was entirely fit to proceed, with the assistance of the tugs. Similar evidence was given by the master and the chief officer of the *Isis* and by experts who were examined by the respondent before the Commissioner (pp. 29-32, *infra*).

The petitioners offered in evidence the record (Exhibit A, R. 455) and the decision (Exhibit B, R. 468) of the Seeamt of Bremen, a body corresponding roughly to our Local Inspectors of Steam Vessels. The decision of the Seeamt was that the *Isis* was seaworthy and fit to proceed (p. 32, *infra*).

The petitioners called no witnesses, except three experts examined before the Commissioner.

The petitioners' case seems based chiefly on the evidence of a witness who said that, *after* the second stranding, a minute bend (to a maximum of 5 degrees) was discovered at the bottom corner or tip of the rudder. The petitioners

ask for a finding (1) that this bend was present *before* the ship left Bremen, in the face of the evidence of the surveyors, who said that it was not present at that time (pp. 23-28, *infra*); and (2) that this bend, if present, deprived the respondent of the benefit of the Harter Act and of the Jason clause, even though the Commissioner and both courts below have found that it was trifling, would not have affected the steering of the vessel and, even if present, had nothing to do with the accident (pp. 22-23, *infra*). It is hard to imagine a more technical contention.

Decisions in the Courts Below.

The Commissioner found:

1. That the *Isis* was seaworthy, etc., on sailing from her last loading port.

2. That the requirements of Section 3 of the Harter Act and of the Jason clause relate to the time of original sailing on the voyage and were fulfilled.

3. That the stranding was caused by an error in navigation by the pilot.

4. That, though the examination made at Bremen was not absolutely exhaustive, yet in fact the *Isis* was *not* unseaworthy on leaving Bremen.

5. That, even if the rudder of the *Isis* had a 5° bend at the lower corner when she left Bremen, that fact was immaterial, because it neither caused nor contributed to the accident.

6. That the *Isis* steered well while going down the river.

7. That the respondent was entitled to the benefits of the Harter Act and of the Jason clause.

The District Court confirmed these conclusions, broadening the first so as to include all of the loading ports. Its

opinion expressly found that the arrangement made for navigating the vessel to Hamburg "*was reasonably necessary in view of the conditions in Bremen; furthermore, it left the vessel seaworthy for the trip to Hamburg*" (R. 546; 57 Fed. [2d], at 283).

The Circuit Court of Appeals made the same findings, save, perhaps, in one respect. It spoke of the vessel as "unseaworthy" on leaving Bremen (R. 563). But it is submitted that the Court was referring merely to the obvious fact that a ship whose rudder is lashed is not fit to proceed *unassisted* —and did not mean that the *Isis*, provided with adequate facilities for steering by means of three tugs and her twin screws, was unfit or unseaworthy *to proceed in tow*. The opinion must be read as a whole. The Court said (R. 561):

"Was the ship seaworthy when it left for Hamburg? Seaworthiness, a relative term, depends upon the circumstances surrounding each undertaking. A vessel under tow may be regarded as seaworthy if the tugs are powerful enough to tow the vessel, even though she is not navigated under her own power.*

* * * The captain and mate of the vessel and the captain of the towboats testified that there was no difficulty experienced in steering the vessel on the way down the river until the junction of the Lesum was approached, and, in so doing, they navigated through several bends in the channel in both directions. * * * If there were a bend in the rudder, the evidence satisfactorily establishes that a competent navigator could not have failed to discover the effect. As the vessel proceeded before the stranding, the three tugs were found below to have been going full speed ahead. But, as found below, the power of the vessel and her tugs was employed" (ample?) "to correct any tendency to sheer, which would affect the navigation or control of the vessel."

And at R. 560, the Circuit Court of Appeals said:

"The finding below that the second stranding was caused by the pilot's error in navigation we think justified by the evidence."

---

* The *Isis* was, of course, navigating under her own power.

The Circuit Court of Appeals nowhere suggests that these tugs had not sufficient power, and there is no contradiction of the evidence that they had. The Court nowhere disapproves, or in terms overrules, the very definite findings of the Commissioner and of the District Court that the *Isis* with the tugs was seaworthy and fit to proceed in tow from Bremen to Hamburg; and the evidence is absolutely overwhelming to the effect that she was entirely fit and seaworthy for that trip (pp. 19-37, *infra*).

The assumption which underlies the petitioners' entire brief—that the *Isis* was unseaworthy to proceed in tow on leaving Bremen—is directly opposed to the finding of the Commissioner and of the District Court and cannot be accepted as a proper basis for argument.

If this Court concludes that the courts below differed on this point, it will, no doubt, re-examine the facts, and accordingly the evidence is summarized at pages 19-37, *infra*.

The case, therefore, is one where the ship, on sailing from her loading ports, had complied with the requirements of the Harter Act and of the Jason clause and where subsequently she encountered an accident because of negligent navigation. Under the express terms of Section 3 of the Harter Act, the respondent is not liable for errors in navigation and, under the terms of the Jason clause (Clause 7 of the Bill of Lading, R. 37), it is entitled to general average contributions growing out of a disaster produced by negligent navigation (*The Jason*, 225 U. S. 32). The Commissioner and both courts below have decided accordingly.

Attention should be called to an evident typographical error in the opinion of the Circuit Court of Appeals, near the bottom of page 563 of the record. The opinion reads:

"The *Isis* was fitted for the voyage, and it was not intended that she would proceed in stages, and, when she sailed *from* Bremen, the owner's warranty of seaworthiness was thereupon performed and discharged."

The word "from" in the foregoing should evidently read "for".

POINTS.

FIRST.

The *Isis*, on sailing from her loading ports, was in all respects seaworthy, etc., and thereby satisfied the implied warranty of seaworthiness and the requirements of the Harter Act and of the Jason clause; and the respondent became entitled to their benefits.

Section 3 of the Harter Act is quoted at page 8 of the petitioners' brief. The Jason clause in the bills of lading (Clause 7, R. 37) follows the language of that section.*

The history of this clause is stated, and its validity and efficacy are upheld, in the *Jason*, 225 U. S. 32. Obviously the scope of the Jason clause is, and is intended to be, coextensive with that of the Harter Act and its language is to be construed exactly as the identical language of Section 3 of the Harter Act is construed. Authorities on one are authorities on the other. The petitioners appear to be in accord with this view (brief, bottom p. 7 and p. 8).

1. Requirement of seaworthiness or due diligence relates to time of starting voyage.

There is an implied warranty of seaworthiness when a vessel, being a common carrier, breaks ground for the voyage at her loading port. Section 3 of the Harter Act in effect requires fulfillment of this implied warranty (or due diligence therein) as a condition of the immunities which that section gives. Under the implied warranty, under the Harter Act and under the Jason clause alike, the requirement is imposed *as of the time when the vessel breaks ground at her loading port or ports.*

---

* A somewhat different form of Jason clause appears in the bill of lading for a small quantity of cargo shipped from Punta Arenas (R. 30). Both Courts below held that this form was legally equivalent to the form used in the remaining bills of lading (R. 509, 535, 546, 559) and the petitioners have not asked for a review of this ruling.

(a) *Cases on Implied Warranty.*

In the *Edwin I. Morrison*, 153 U. S. 199, 210, this Court approved the opinion of Mr. Justice Gray, sitting on circuit, in the *Caledonia*, 43 Fed. 681, 685, as follows:

"In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy *at the time of beginning her voyage.* * * * The warranty is absolute that the ship is or shall be in fact seaworthy *at that time.* * * *" (Italics ours.)

When the *Caledonia* reached this Court (157 U. S. 124, 130), the foregoing was repeated and the Court said:

"We see no reason to doubt the correctness of the rule thus enunciated."

And at page 133, the Court continued (quoting from Mr. Justice, then District Judge, Brown in the *Eugene Vesta*, 28 Fed. 762, 763):

"There can be no doubt that there is an implied warranty on the part of the carrier that his vessel shall be seaworthy not only when she begins to take cargo on board but when *she breaks ground for the voyage.* The theory of the law is that the implied warranty of seaworthiness shall protect the owner of the cargo until his policy of insurance commences to run; and, as it is well settled that the risk under the policy attaches only from the time the vessel breaks ground, this is fixed as the point *up to which the warranty of seaworthiness extends.*" (Italics ours.)

In the *Irrawaddy*, 171 U. S. 187, at 190, this Court said:

"Further, it has frequently been decided by this court that in every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy *at the time of beginning her voyage.* * * *" (Italics ours.)

And in the *Southwark*, 191 U. S. 1, at page 6:

"Before the passage of the Act of Congress of February 13, 1893, known as the Harter Act, it was the settled law of this court that, in the absence of special contract, there was

a warranty upon the part of the shipowner that the ship was seaworthy *at the beginning of her voyage.*" (Italics ours.)

The same rule was restated in the recent case of *Earle & Stoddart* v. *Wilson Line,* 287 U. S. 420, at 426, as follows:

"Those cases" (the *Edwin I. Morrison,* 153 U. S. 199; the *Caledonia,* 157 U. S. 124, and the *Carib Prince,* 170 U. S. 655) "enunciate the rule that in every contract of affreightment there is, unless otherwise expressly stipulated, an implied warranty of seaworthiness *at the commencement of the voyage.* The warranty is absolute that the ship is in fact seaworthy *at that time.* * * *" (Italics ours.)

To the same effect:

The Irrawaddy, 171 U. S. 187, 190.

The law on the subject is summarized in *Carver on Carriage by Sea* (7th Ed.), Section 21, as follows:

"The warranty of seaworthiness for the voyage must be satisfied at the time of sailing with the cargo. It is not sufficient that the ship was fit for the voyage while the cargo was being taken in, if she became unfit before she started. The warranty, in truth, appears to be a double one: viz., that the ship shall be fit to receive the cargo when receiving it, and shall be fit to sail at the time of sailing.

On the other hand, there is no undertaking that she will continue fit after sailing. If from any cause she afterwards becomes unseaworthy, and this leads to loss, the shipowner is only liable if the cause was one for which he was answerable."

In the *Vortigern,* 1899 Pr. D. 140, 152, the Court pointed out that "there is no warranty that the ship shall continue seaworthy during the voyage."

In *McFadden* v. *Blue Star Line,* 1905, 1 K. B. 697, at 703, the Court said that

"it is not a continuing warranty, in the sense of a warranty that she shall continue fit during the voyage."

And at page 704:

"The ordinary warranty of seaworthiness, then, does not take effect before the ship is ready to sail, nor does it continue to take effect after she has sailed; it takes effect at the time of sailing, and at the time of sailing alone."

(b) *Cases under the Harter Act and the Jason Clause.*

It is well settled that the rule is the same with respect to the time when the requirement of Section 3 of the Harter Act speaks.

In *International Nav. Co.* v. *Farr & Bailey Mfg. Co.*, 181 U. S. 218, suit was brought for damage to cargo by sea water in consequence of an unfastened port in the ship's side. It was argued that Section 3 of the Harter Act was a defense, even though the ship had been unseaworthy on sailing. This Court said, at page 225:

"We cannot accede to a view which so completely destroys the general rule that seaworthiness *at the commencement of the voyage* is a condition precedent and that fault in management is no defense when there is lack of due diligence *before the vessel breaks ground.*" (Italics ours.)

The requirement of the Harter Act

"in our judgment means due diligence on the part of all the owner's servants in the use of the equipment *before the commencement of the voyage and until it is actually commenced.*"

At page 226:

"The obligation was to use due diligence to make her seaworthy *before she started on her voyage,* and the law recognizes no distinction founded on the character of the servants employed to accomplish that result.

We repeat that even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy *when she sailed,* or due diligence to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions. The word 'management' is not used without limitation, and is not, therefore, applicable in a general sense as *well before as after sailing.*" (Italics ours.)

The same rule was reaffirmed in the *Southwark*, 191 U. S. 1, at 13, in the following language:

"As we have before stated, the right of the carrier to be exonerated in the respects named in the Harter Act depends upon the exercise of due diligence upon his part in discharging the primary duty of providing a seaworthy vessel. The burden of proof being upon the carrier to show that he has exercised due diligence to provide a seaworthy vessel *at the time he received the meat and started upon the voyage*, the question arises, was this duly discharged?" (Italics ours.)

To the same effect, the *Wildcroft*, 201 U. S. 378, at 386:

"In order to have the benefit of the exemptions provided in the Harter Act * * * it was incumbent upon the shipowner to prove that the vessel was seaworthy *at the time of beginning the voyage* or that due diligence had been used to make her so." (Italics ours.)

In the *Steel Navigator*, 23 Fed. (2d) 590 (C. C. A., 2nd Cir.), the Court said (pp. 591, 592):

"The covenant of seaworthiness is to be determined when the ship breaks ground and only then. (Citing cases.) * * * Especially is it necessary to remember that the measure of what can in any event be demanded of her is her fitness for the whole voyage as contemplated at the outset. Adjustments made necessary by subsequent events pertain to her management, and cannot touch her seaworthiness."

2. If a vessel was seaworthy on starting her voyage, her owners are entitled to the benefits of the Harter Act and the Jason clause, even though subsequent faults or errors in management or navigation have made the vessel unseaworthy at sea, at ports of call, or at destination.

(a) *At Sea.*

In the *Silvia*, 171 U. S. 462, the crew failed to close certain iron shutters in heavy weather at sea and cargo damage resulted. Although the ship was, of course, unseaworthy for such weather with the shutters open, she had been seaworthy on sailing, and was therefore entitled to the benefits of the Harter Act.

To the same effect:

The Newport News, 199 Fed. 968;
The Carisbrook, 247 Fed. 583.

(b) *At Ports of Call.*

In the *Steel Navigator,* 23 Fed. 590 (C. C. A. 2nd Cir.), the ship was seaworthy when she left her loading port. At a port of call, her after peak was filled with ballast water and the crew neglected to close securely a cover, through which water leaked and damaged cargo. It was held that, since this was a fault in management, the Harter Act protected the ship, although she was unseaworthy when she sailed from the port of call.

Failure properly to close valves in a pipe line at a port of call, with the result that ballast water enters the cargo, is likewise a fault in management.

Jay Wai Nam v. *Anglo-Amer. Oil Co.,* 202 Fed. 822 (C. C. A., 9th Cir.).

Negligent inspection of the vessel at a port of call is a fault in management, within the Harter Act.

United States v. *New York & O. S. S. Co.,* 216 Fed. 61 (C. C. A., 2nd Cir.);
The Milwaukee Bridge, 26 Fed. (2d) 327, 330 (C. C. A., 2nd Cir.).

In the *Guadeloupe,* 92 Fed. 670, the ship was seaworthy on sailing but was damaged by a storm. She put into a port of refuge, but the master failed to make sufficient repairs, and damage to cargo resulted. This was held an error in management, within the Harter Act.

(c) *At Destination.*

In the *Wildcroft,* 201 U. S. 378, cargo was damaged at the port of destination by fresh water taken in from the river to fill a tank, because of the engineer's neglect to close a valve. This was held an error in management, for which the ship was not liable under the Harter Act.

To the same effect, *The Indrani*, 177 Fed. 914 (C. C. A., 2nd Cir.).

In all of the foregoing cases, damage was caused because the ship was unseaworthy; but, since she had been seaworthy at the outset of her voyage, she had fulfilled the conditions of the Harter Act and was entitled to its protection.

3. When a vessel reaches an intermediate port in an unseaworthy condition and, because of insufficient inspection, she sails with that condition unremedied, the fault or error is one in the management of the vessel, for which the shipowner is not liable.

The above proposition is directly supported by the following decisions already referred to:

The Guadeloupe, 92 Fed. 670;
United States v. *N. Y. & O. S. S. Co.*, 216 Fed. 61 (C. C. A., 2nd Cir.);
The Milwaukee Bridge, 26 Fed. (2d) 327 (C. C. A., 2nd Cir.).

Those decisions are correct in principle, and there is no decision in any other circuit at variance with them. The petitioners seem to concede this proposition (brief, pp. 25, 31).

From what has been said, it is beyond question (1) that the duty as to seaworthiness imposed by the Harter Act and by the Jason clause is completely fulfilled if the ship is seaworthy when she leaves her loading port; (2) that if she subsequently becomes unseaworthy, at sea or in a port of call, that fact does not deprive her of the benefit of the Harter Act or of the Jason clause.

The petitioners do not question the finding of both courts below that the *Isis*, on sailing from her loading ports, had fulfilled the requirements of the Harter Act, the Jason clause and the implied warranty of seaworthiness. Consequently, the respondent is entitled to the benefit of the Harter Act and of the Jason clause as regards errors in navigation,

and even (if the question arise) as regards errors in management, causing the vessel to leave a port of call in an unseaworthy condition.

It is important to observe that this is *not* a case of voyage in stages. There are cases where a vessel sails without being seaworthy for the entire voyage—for instance, not having sufficient fuel to carry her to her final destination—but where she is seaworthy to proceed to the first port of call, at which the deficiency in fuel, etc., is to be made good. It is well settled that, on such a voyage in stages, the vessel need not, at first setting out, be seaworthy for the entire voyage, but only for the first stage, provided, however, that, at her port of call, she is made seaworthy in the respect of the deficiency for the remainder of the voyage or for the next stage. If this is not done, she is considered to have been unseaworthy *ab initio*. In such cases of voyage in stages, the failure to remedy at a port of call a deficiency which existed when the vessel originally sailed relates back to the original sailing, and such a vessel has not complied with the terms of the Harter Act.

See:

The Willdomino, 300 Fed. 5, 11, 12;
Carver, Carriage by Sea (7th Ed.), Sec. 19-B.

The Circuit Court of Appeals for the Second Circuit in the *Steel Navigator,* 23 Fed. (2d) 590, 592, recognized the principle as a *relaxation* of the ordinary warranty of seaworthiness.

The Commissioner (R. 530) considered the doctrine of voyage in stages and concluded, quite correctly, that it had no application to the present case. The Circuit Court of Appeals took the same view (R. 560). Indeed, it is conceded that the *Isis* was seaworthy when she left her loading ports and that no deficiency was left to be supplied at subsequent ports of call. Consequently the authorities as to voyages in stages, a number of which are cited by the petitioners, are not in point here.

SECOND.

The stranding was due to the negligent navigation of the pilot.

The Commissioner and both courts below found as a fact that the stranding now in question was caused by the pilot's negligent navigation. The Commissioner said (R. 516):

"* * * I find and advise the court that the stranding was caused by an error in navigation on the part of the pilot; and that unseaworthiness, if any, in respect of the steering gear of the *Isis* did not cause or contribute to the stranding."

A formal finding to this effect was made in the Commissioner's report at R. 533. The District Court confirmed it (R. 544-548).

The Circuit Court of Appeals said (R. 560):

"The finding below that the second stranding was caused by the pilot's error in navigation we think justified by the evidence."

On familiar principles, this Court will not disturb this finding, made by both courts below, unless it is manifestly unsupported by the evidence.

Compania la Flecha v. *Brauer,* 168 U. S. 104, at 123;
The Carib Prince, 170 U. S. 655, at 658;
International Navig. Co. v. *Farr & Bailey Mfg. Co.,* 181 U. S. 218, 224;
The Germanic, 196 U. S. 589, 595;
The Wildcroft, 201 U. S. 378, 387.

In *Davis* v. *Schwartz,* 155 U. S. 631, at 636, the Court said:

"As the case was referred by the Court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so

far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of the jury, the findings of a Circuit Court in a case tried by the Court under Rev. Stat., Sec. 649, or in an admiralty cause appealed to this Court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable."

This is especially true where the reference was by consent, as it was here.

The Elton, 83 Fed. 519, 520 (C. C. A. 4th Cir.).

The evidence in support of this finding is summarized, for the convenience of the Court, in Appendix A (pp. I-IV, *infra*).

The foregoing points, it is believed, suffice to dispose of the case. On leaving her loading ports, the ship had fully complied with the Harter Act and the Jason clause. Therefore, she was entitled to their benefit in respect to errors of navigation. It has been found by two courts, on ample evidence, that the accident in question was due to an error of navigation; and the conclusion inevitably follows.

Nevertheless, in view of the argument on other points in the petitioner's brief, those points also will be dealt with, though, it is submitted, they are in reality immaterial.

THIRD.

The *Isis* was in fact seaworthy and fit to proceed, when she sailed from Bremen.

The Commissioner found that the *Isis* was seaworthy and fit to proceed with the tugs on sailing from Bremen (R. 525). The District Court specifically made the same finding (R. 545, 546). The German Seeamt, or Court of Inquiry, whose report was offered in evidence by the petitioners,

reached the same conclusion. Its finding is quoted at page 32, *infra*. The opinion of the Circuit Court of Appeals on this subject has already been discussed (pp. 8-9, *supra*).

The petition for certiorari does not assert that the *Isis* was unseaworthy, except in that

"her rudder * * * was bent so that, even with the rudder lashed amidships her course would be erratic and she could not make such a voyage safely while being steered by tugs" (Petition, p. 3).

There is no magic about the word "seaworthy." It means, not that the vessel is perfect, but that she is reasonably fit for the service which she is to perform. She must have merely that degree of fitness which a prudent owner would require.

The general rule is stated in the *Silvia*, 171 U. S. 462, at 464, as follows:

"The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport."

The foregoing statement is illustrated by a long line of authorities, both prior and subsequent.

In the *Marlborough*, 47 Fed. 667, the Court said (p. 670):

"What constitutes seaworthiness is not, I think, open to controversy. The vessel must be reasonably safe for the service and voyage undertaken. There are, however, degrees of safety; and she need not be the safest. A new vessel, of the highest order of construction, is safer than one several years old and of a lower order of workmanship. Yet the latter may be, and, if in good condition, is, seaworthy. A majority of vessels in the merchant service, employed on the most dangerous voyages, are of the latter description."

In *McCaldin* v. *Cargo of Lumber*, 198 Fed. 328, the Court said (p. 329):

"A vessel need not be perfect, or such as cannot break down except under extraordinary peril. If such were the

requirements, our merchant marine would altogether disappear. The rule governing is founded, as usually in matters of this character, on good sense and sound reason. The degree of fitness demanded is that which an ordinary, careful, and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it, Carver on Carriage by Sea, Sec. 18, p. 21. * * *"

This decision was affirmed (202 Fed. 735).

Other cases discussing the question are:

The Titania, 19 Fed. 101;
Hamilton v. *United States,* 268 Fed. 15;
Brick v. *L. I. R. R. Co.,* 245 N. Y. 222.

The English cases lay down the same rule.

Bradley v. *Fed. Steam Nav. Co.,* 24 Lloyd's List Rep. 446; aff'd in the House of Lords, 17 Asp. M. C. 265.

The test of seaworthiness varies with the service to be performed. A ship may be seaworthy to load cargo, or to lie at anchor with it on board, when she is not seaworthy to sail (*McLanahan* v. *Univ. Ins. Co.,* 1 Pet. 170, 184). She may be seaworthy for one voyage but not for another. As was said by the Circuit Court of Appeals for the Second Circuit in the *Sagamore,* 300 Fed. 701, 704:

"Unseaworthiness is a comparative term. A vessel may be perfectly seaworthy for cargo-carrying purposes around the harbor, and not be seaworthy for oceanic carriage; and she may be seaworthy for the carriage of a load of lumber, and not be seaworthy for a load of steel rails."

So she may be perfectly seaworthy to proceed from Bremen to Hamburg with the assistance of tugs, when she might not be fit to go unaided, or to cross the Atlantic. The question is simply, had she the degree of fitness which a reasonable owner would require for the particular thing which she was to do?

Obviously it cannot be said as matter of law that ships must not be towed or, if an accident has disabled the steering gear, must not proceed with the aid of tugs. The question is one of fact in each case.

To enable this Court to re-examine the question, if desired, the overwhelming evidence on the subject is here summarized:

1. The alleged bend in the rudder, if it existed, was immaterial, as found by both Courts below.

The criticism made by the petitioners is based chiefly on the fact that, when the ship was drydocked, following her *second* stranding, it appeared that the corner of the bottom of her rudder was bent to a maximum of 5 degrees to starboard. This deflection diminished to nothing halfway up the height of the rudder and also about halfway along its fore and aft width (R. 239, 246).

There is no proof that this bend existed when the *Isis* left Bremen, or that it was not caused by her second stranding—indeed, the respondent contends that it was, in all probability, occasioned when the ship's stern struck at the time of the second stranding (pp. 26-28, *infra*). But, assuming that the bend was present when the ship left Bremen, it was a matter of no consequence, because, as the experts testified, as common sense shows, and as both Courts below found, such a slight deflection would have had absolutely no practical effect on the steering of the ship. The evidence of the experts shows that the *whole* of the rudder has to be turned to an angle of 10 degrees, before it has any appreciable effect on the ship, at the speeds involved in this case. This deflection affected perhaps 20 per cent. of the rudder's surface, and, even in this comparatively small area, would not average more than 2½ degrees. It was the equivalent of about one-half of one degree of deflection of the entire rudder blade, and it needs no argument to show that a rudder put over one-half of a degree, or one degree, has no perceptible effect. Not only was this the testimony of Mr. French, the Chief Surveyor of Lloyd's in the United States, and of Captain Davis, head of the marine and salvage department of

Merritt-Chapman & Scott, whom the Commissioner rightly found to be by far the most competent practical expert examined, but the Commissioner found definitely that, assuming that the bend existed at the time when the *Isis* left Bremen, it did not make any difference. He said (R. 524):

"These views I adopt as far more convincing than those to the contrary of the other witnesses who failed to support their conclusions with satisfactory reasons from experience."

At R. 525:

"I therefore conclude that the *Isis* was not unseaworthy on sailing from Bremen under the conditions under which she actually did sail, including the assumption that she had a deflection in her rudder blade of 5° in the lower half, which was unknown to those in charge of her."

The District Court concurred in this conclusion (R. 545, 546).

The Circuit Court of Appeals (R. 561) said that "it was established that it" (the bend) "had no effect upon the navigation of the vessel."

Here again there is a finding of fact by the Commissioner and by both Courts below; and, since there is ample evidence to support it, it will not be reviewed here. The evidence on this subject is summarized in Appendix C (pp. VII-X, *infra*).

2. The rudder blade was carefully inspected before the Isis left Bremen and was found to be straight.

So long as the *Isis* was actually seaworthy, the character of the inspection at Bremen makes no difference. In fact, however, the Commissioner hardly did justice to the measures which were taken by the respondent. Mr. French testified that, in similar cases, he simply has a diver's report on the rudder (R. 390). In the present case, a diver reported that the rudder was in perfect order, after he had gone down and examined it four times (Krueger, R. 87). Reichenbacher would have been justified in sending the ship out on this examination alone, but, as an additional precaution, he had her

drydocked and the water pumped out, so far as it could be with the cargo on board. The inspection was then made, shortly after 5 P. M., by five competent men, four of whom were in a small boat directly astern of the rudder. The surveyors were Reichenbacher, the marine superintendent; Schubert, an inspector employed by the respondent; Menck, the man in charge of the shipbuilding and repair work of the Weser Shipyard; Wuehrmann, inspector of the Weser Company's drydocks and a former ship master; and the master of the *Isis*.

The water was pumped down so that more than three-quarters of the blade was exposed, and, since the deflection about which the libelant speaks extended halfway up the blade, it would surely have been seen if it had been there when the inspection was made. It is certain that all of the rudder which was out of water was straight, and the small section which was below water was examined by hand, by straight edge and by a powerful searchlight, and that also was found straight. Captain Reichenbacher testified (R. 158, 159):

"Q. Did you see her in drydock? A. Yes.
Q. Did you examine the rudder? A. Yes, I did.
Q. In what condition did you find the rudder? A. The rudder blade was in good order; there was nothing that you could see in the blade. But we could see that the rudder stem was twisted to starboard.

* * * * * *

Q. Was the rudder blade itself twisted or bent in any way? A. No, that was straight and in good order."

At R. 255:

"Q. So you were looking to see if the rudder blade was straight? A. I was absolutely sure there was nothing wrong with the rudder blade."

Menck, chief engineer of the Weser Company, said (R. 194):

"Q. What was the condition of the rudder? A. The rudder blade was straight but the rudder post was twisted."

If the bend was there when the vessel was docked, it must have extended above the water line for a distance of 4 to 5 feet directly in front of the eyes of the four experienced men who were in the small boat right at the rudder blade. *They could not have failed to see it if it had been there.* They all say that it was not there (Reichenbacher, R. 159, 253-255; Menck, R. 194, 195; Wuehrmann, R. 198; Schubert, R. 242, 244; Krueger, R. 58, 59). It is difficult to dismiss them all as either perjured or incompetent.

As for the remaining 3½ feet, a man's arm would easily run down 2 feet (Reichenbacher, R. 254) and any bend could be detected without difficulty. In addition to that, a straight edge was used and this is the standard method of testing. The petitioners' witness McLennan so states (R. 294, 297). Captain Davis testified that an examination with a straight edge was a proper method to use, and that such an examination would show even a slight deflection (R. 409).

Reichenbacher testified (R. 254):

"After that we used a small piece of wood and the rudder was like this (describing) and we were searching down to the bottom to see whether there was anything wrong.

Q. You have indicated with your hands the putting of strips of wood down to the bottom? A. Yes.

Q. In the first place, about these pieces of wood, you indicated with your hands that you placed the strips of wood up and down the sides of the rudder in different places? A. Yes.

Q. Could you tell in that way whether the last two or three feet of the rudder was straight or not? A. Everything was exact—it was quite straight and there was nothing bent.

Q. And could you be sure of that with your examination? A. Yes, quite sure."

It should be noted that two of these surveyors were repair men, who would have been glad to find something wrong with the rudder and thus to get a job for their yard. Menck, one of these two, examined the rudder at this time and also when the ship was drydocked after the *second* stranding. *He said that the blade was straight the first time and was bent the second time* (R. 194, 195).

Both the petitioners and the Commissioner refer to the statement of Captain Asmus (R. 246, 247) as meaning that the surveyors' inspection would not have disclosed this bend. The evidence in question is as follows:

"Q. I mean this: Assuming that the rudder was under the water, and that the only means you had to find out the twist was by taking a rod and running it up and down the rudder, do you think that such a rod would have disclosed the twist which you saw with your eye? A. No."

This question presupposes that the rudder is *under water*, and that an attempt is being made to find this slight deflection at a depth of some 18 feet below the surface by "running" a rod up and down; whereas, in fact, the rudder was almost entirely out of water and the examination was by a straight edge. The question has nothing whatever to do with the actual facts.

To repeat—the rudder was examined by actual eyesight by four men, besides the master, from the top down to a point *some 5 feet below the point where the bend is alleged to have started.* The lowest 3 or 4 feet were tested by the application of a straight edge and by feeling with the hands down nearly to the bottom of the rudder.

The discussion is perhaps superfluous, since the bend, if present, had nothing to do with the accident, but it should be pointed out that the probability is that the bend occurred at the time of the second stranding, not of the first. The fact that the surveyors found the rudder straight before the *Isis* left Bremen, but bent when she returned after the second stranding, strongly indicates this. That was also the opinion of the master. When the *Isis* was at or near the point of land between the two rivers, as her bow was swinging to starboard before the Lesum current, her stern swung to port, as it necessarily would, and struck bottom twice (R. 67, 78, 102-104, 123). Her master thought that the bend in the rudder occurred at this time. He said (R. 123):

"Well, I think that bend—we get that bend on the first time we touched the ground with our stern—I mean on the trip down from Bremen on (to?) the Lesum."

Q. When the boat hit twice in the vicinity of the buoy at the Lesum bank, and before she finally swung around across the river? A. Yes."

The chart (Exhibit 8) shows, and the buoy master testified (Seeamt, R. 461), to a shoal spot on the westerly (or port) side of the bank on which the ship was stranded. When her officers took soundings, the buoy and the shoal spot were opposite her No. 4 hatch (R. 104, 105). These soundings were made *after* the tugs had pulled her a little distance astern from the position where she originally struck (R. 67, 105). Consequently, the buoy and the shoal spot were about under her stern when she originally brought up (R. 103, 105, 113, 114), and, as her stern swung to port and struck, the lower corner of the rudder would be very likely to become bent.

The master testified (R. 103):

"Well, on this buoy is not much water. There is where the stern hit the ground—that isn't real bank here on this buoy, the bank is a little further in, but there is not much water, and the ship was 3½ (23½?) feet deep. * * *"

Witnesses on both sides agree that rudder stocks are often twisted without bending the rudder blade (McGregor, R. 371; Jordan, R. 342; French, R. 379; see Davis, R. 404).

The petitioners suggest (brief, appendix, p. v.) that the rudder could not have been damaged in this way without damaging the stern post or frame. But the rudder tip is several feet aft of the stern post. It is hardly possible that the stern post *could* have been affected by a blow on the tip of the rudder. The petitioners' objection would apply equally to their own theory that the bending occurred at the first stranding. Their own witness, McLennan, testified (R. 314) to a case of exactly what the petitioners say is impossible.

The petitioners suggest also that, if the rudder had struck, the impact would have made the quadrant screw give and the rudder move, thus causing the screw to score the quadrant. Obviously that depends on whether or not the

rudder blade would bend slightly and take up the blow before the pressure would force the quadrant loose from its screw. Since here the rudder *did* bend, it is not likely that the quadrant also would have been affected.

The Seeamt found (R. 478) that the bending occurred at the time of the second stranding. The Commissioner was uncertain when it occurred (R. 522).* The District Court made no further finding on the subject. The petitioners suggest that the Circuit Court of Appeals found that the rudder was bent on sailing from Bremen. But when the opinion is read as a whole it seems plain that the Court made no finding on the subject. It assumed, *arguendo*, that the rudder was bent, but considered the question immaterial, for the reason that the bend, if present when the ship left Bremen, was a matter of no consequence (R. 561, 562).

3. The rudder was properly lashed and secured.

There seems to be no dispute about this. No witnesses contradicted the testimony given by all of the surveyors and experts who were present when the work was done.

They put the rudder amidships and lashed it by means of wire ropes bent through holes in the rudder blade aft (Reichenbacher, R. 159, 160).

"We led them on deck by tackles on both sides and heaved them tight with the ship's winches" (R. 159).

They also screwed down the rudder quadrant so that it could not be moved (R. 159, 160). The rudder was thus held straight amidships, and

"there was no possibility of moving the rudder in any way. It was as firm as iron" (R. 159).

They tried to move it and could not (R. 171). Similar evidence was given by Menck (R. 194). To the same effect,

* The Commissioner speaks of the burden of proof regarding this subject as being on the respondent (R. 522). In fact, it is on the petitioners. They are asserting a cause of action for negligence in sailing from a port of call with the rudder bent and the burden of establishing is on them.

Wuehrmann, R. 198 (the rudder was "right amidships"), 205; Schubert, R. 242; Krueger, R. 60, 61; Schier, R. 262-264.

The rudder was still amidships in its original position when the vessel returned after the second stranding (Menck, R. 194, 195; Asmus, R. 239; Schier, R. 264, 265).

4. The Isis was in good condition to proceed and the tugs were of ample power.

The *Isis* was a twin-screw vessel with total horsepower of about 2,400 (R. 162). She was in perfect trim to handle, drawing 18 feet 5 inches forward and 23 feet 5 inches aft (R. 163). As the Commissioner says (R. 523):

"Capt. Davis considered that the fact that the *Isis* left Bremen about 5 feet by the stern was of material assistance in controlling the vessel at slow speed with the assistance of tugs" (see Davis, R. 401).

The tug *Hoheweg* was made fast ahead. She had 1080 horsepower (R. 162, 177). The *Lankenau* was made fast to the port side abreast of No. 4 hatch. She had 800 horsepower (R. 176). The *Eversand* was in a corresponding position on the starboard side. She had 810 horsepower (R. 177). These tugs more than doubled the power which the *Isis* would have had if she had been proceeding down the river alone.

The master and a large number of experts familiar with the river have testified that there was ample power to handle the ship, and that she was perfectly seaworthy to proceed (Krueger, R. 61, 62; Schier, R. 268; Reichenbacher, R. 160, 163, 164, 170; Klassen, R. 178, 180; Julicher, R. 185, 186; Menck, R. 196; Wuehrmann, R. 199; Saxe, R. 210, 215, 218; Thiessen, R. 221; Sievers, R. 233; Asmus, R. 238).

Mr. French, Captain Davis and Captain Huseby all agreed that the tugs were properly located; that they had ample power; and that the ship's condition made it perfectly proper for her to go. Mr. French said (R. 382) that she was better off with her rudder lashed and with the towboats than she would have been with her own rudder and no tugs.

Captain Davis expressed the same opinion, except at high speeds. He said (R. 402):

"A. At high speeds a ship can be handled better with her rudder than with tugs. At low speed, the tugs are better.

Q. Suppose you were called upon to stop a vessel in a narrow channel like the Weser to wait for a ship to come up the river and you had a tide running against you of about three kilometers per hour, which would you prefer, to have three tugs as the *Isis* had and the rudder lashed, or to have your own engines and your rudder in working order? A. The tugs.

Q. Would there be any question in your mind about it? A. No question at all about that."

He considered the *Isis* fit to proceed under the conditions stated (R. 402).

Captain Huseby said (R. 427) that she had

"more power than we ever would have on a ship of that size, regardless of where she may go. Besides that, you have a twin-screw ship and the two propellers working can be used if you want to use them. I would say that you were in a better position and better shape to go up that river with your own ship's power, a twin-screw ship and three tugs, than with a ship alone going up.

Q. Or going down? A. Absolutely."

The captain of the vessel testified specifically (R. 74):

"* * * we had more steering power at that time than we would have had without tugs and the rudder intact."

As already stated, there were five men present when the rudder was inspected. All, including Captain Krueger, approved of sending her (R. 160). The towage was also discussed with Mr. Meinicke, director of the Unterweser Towage Company, who also approved (R. 160), as did the surveyor of Germanischer Lloyds (R. 161, 184), and the available underwriters (p. 4, *supra*). Captain Krueger was not limited as to the number of tugs but was at liberty to engage more, if he wanted them, which he did not (Krueger, R. 62;

Reichenbacher, R. 162). Klaasen, the only one of the tug masters who was available for examination, said that the tugs had power "completely" sufficient to handle the *Isis* (R. 178, 180). To the same effect Julicher, chief surveyor for Germanischer Lloyds (R. 185-186); Krueger (R. 68, 74, 79). Similar evidence was given by Menck, chief engineer of the Bremen Dock (R. 196), by Wuehrmann (R. 199, and by Saxe (R. 210, 215, 218). Thiessen, another towage expert on the Weser, said that the tugs "were absolutely sufficient" and that the ship was safe and seaworthy for the trip (R. 221).

The evidence taken in Hamburg shows a large number of cases of towage, up and down the Weser and similar rivers, of vessels, some without engines, others in distress, many of them much larger than the *Isis*, as well as the towage of large battleships and floating drydocks (R. 165, 174, 175, 177, 198, 208-210, 222-225, 230-232).

The petitioners called three experts. Two of them were engineers, who had had no experience in navigation whatever, and one was a sea captain, who was once towed from Madeira to Barry, and who has been assisted by tugs in rivers. He has never done any towing himself and obviously could not compare in experience with Davis or with Huseby.

The petitioners' experts, by the way, constantly spoke of the advantage of a ship's having *her own power*. They constantly compared a ship which was solely in the hands of tugs with a ship which had her own power. Here the *Isis* had both her own power *and* tugs.

Of course, as the experts say, at slow speeds tugs are obviously more efficient than a rudder, and everyone knows that a steamer, traveling at a low speed, answers her rudder *very* sluggishly, if at all.

The petitioners do not mention the finding of the Seeamt (which *they* offered in evidence) that the ship was in proper condition to proceed with the assistance of the tugs, and that the tugs had adequate power. The Seeamt said (R. 477):

"It must be admitted therefore that no fault was committed with regard to the number and power of the tugs.

* * * There should have been no hesitation in starting the voyage with a vessel so equipped and aided. It may be pointed out that flotilla tows disposing of much less steering and motion capacity, navigate the river Weser without endangering navigation or themselves, for instance pontoons, cranes, etc., which have no engine of their own. There is nothing extraordinary in starting such voyage and it can never be avoided."

Therefore, no less than fourteen witnesses testified, and the Seeamt found, that it was perfectly proper for the ship to proceed under the actual circumstances, and the only evidence to the contrary is the considerably qualified statement of the libelant's own three experts, two of whom were not, and never had been, navigators at all, and who were contradicted by the respondent's more credible and experienced experts.

With this record, the findings of the Commissioner and of the District Court that the ship was seaworthy and fit to proceed were amply supported by evidence.

5. The navigation of the Isis, up to the time of the negligence which caused her stranding, proves that she was perfectly fit to proceed.

The facts that the *Isis* was fit to proceed; that she did not have a tendency to sheer constantly to starboard; that she could be handled by the three tugs; and that the tugs and her engines were effective and perfectly capable of steering her, are all established by the navigation of the vessel from the time she left Bremen up to the accident at the Lesum.

She left her dock at 1.30 A. M. (R. 483) and actually started down the river at 2.11 A. M. (Krueger, R. 75). It was about 3.52 A. M. when she stranded at the mouth of the Lesum (see deck log, Exhibit 11, R. 483). During the intervening period, she was navigating a narrow channel, and, if there had been any difficulty in handling her, it would have developed almost at once, as the experts on both sides say. No such difficulty developed. Captain Krueger said (R. 73):

"Q. As you went down from Bremen until you got down almost to the Lesum, please state whether or not you had

any difficulty in steering your ship, with the tugs and your own engines. A. No, we had no difficulty at all, because the ship was steering very well down the river up to this position here where we passed the other boat. We have lots of bends here, right here too, where we passed all right, and the ship was going all right all the time.

Q. Were your engines used to help in steering around the bends? A. Yes.

Q. Either to port or starboard? A. Yes.

Q. Did they work all right with the tugs? A. Yes.

Q. Were there times, as you came down the river, that both of your engines were stopped and the tugs handled you alone? A. Oh, yes, we had sometimes stopped for 20 minutes, and the tugs was handling the ship all alone."

To the same effect, Krueger (R. 64, 74, 95, 128, 129).

Chief Officer Schier testified (R. 267):

"Q. During the time that you were on the bridge, until you left at 2.30, please state whether or not there was any trouble in steering your boat as you went down the river? A. No, there was no trouble.

Q. Did she show any indication of sheering in either direction? A. No."

Klaasen, master of the tug *Lahkenau*, said (R. 178):

"As you went down the river with the ship before this accident happened, had you any trouble in handling or steering the ship? A. No."

The engine maneuver book (Exhibit 7) shows precisely how the propellers of the *Isis* were operated. The abbreviations used in the maneuver book are explained and translated at R. 77, 78. A translation of the entries is annexed to this brief (Appendix B, pp. v-vi).

Not only is there no indication in the operation of the engines that the ship had any tendency to sheer to starboard, but the maneuver book affords clear proof to the contrary.

We know the time of departure, the time of stranding and the distance. Therefore, the speed (a little less than 5 knots) is known and the time at which the vessel reached various points can be closely approximated. With the vessel pro-

ceeding steadily, there can be no substantial error in the captain's testimony as to where the ship was at the various times given, and the maneuver book shows that the engines were being used for steering purposes, in conformity with the bends in the river.

After the *Isis* started down the river at 2.11, the first part of her passage, to kilometer 9, which was reached at 2.40, required a swing to port (see chart; Krueger, R. 75). If the rudder had had a substantial bend to starboard, it would have been necessary to keep the starboard engine running ahead, more or less constantly, in order to offset it, but at 2.12, the starboard engine was stopped and remained stationary until 2.18, when it was put *slow astern*. At 2.19, it was again stopped and remained so until 2.25. At 2.24, the port engine was stopped until 2.40 and the starboard engine was then used, precisely as one would expect it to be used; in steering the ship on the bend to port. The orders "slow ahead" and "stop" were repeated at intervals of a minute, except that, from 2.30 to 2.35, the starboard engine, as well as the port, was *stopped*, save for a momentary kick ahead at 2.32.

From 2.40 to 2.53, the vessel ran from kilometer 9 to kilometer 11 (Krueger, R. 76). That is practically a straight reach (see chart). The port engine was stopped for 10 of these 13 minutes (from 2.40 to 2.43 and from 2.46 to 2.53), and the starboard engine was stopped for 8 minutes (from 2.40 to 2.41, from 2.42 to 2.44, from 2.45 to 2.50). Then came a slight bend to port, and the port engine was still from 2.53 to 3.16; while the starboard engine was stopped from 2.51 to 3.16, except for occasional kicks ahead at 2.54, 2.57, 3.04, 3.08, 3.12, 3.14. This, again, is what one would expect—the port engine stopped and the starboard giving occasional kicks ahead.

About 3.16, began a bend to starboard from the 13th kilometer, and accordingly the port engine was again used at intervals between 3.16 and 3.25, while the starboard was stopped most of the time (3.16 to 3.17, 3.17 to 3.18, 3.18 to 3.26).

It was at 3.40 that the *Isis* passed the other steamer bound up the river (Krueger, R. 77). Between 3.26 and 3.40 the

course was about straight (see chart) and the port engine was stopped for 10 minutes (3.25 to 3.32, 3.32 to 3.36), while the starboard engine was stopped for 8 minutes (3.26 to 3.27, 3.27 to 3.33, 3.34 to 3.35).

If the *Isis* had not been steering properly, that fact must have been disclosed, as Captain Davis testified (R. 412, 414), in the first quarter mile. The maneuver book, however, entirely corroborates the evidence of the master, the chief officer and tug captain that nothing of the kind occurred. Klaasen, master of the tug on the port side, said (R. 179) that his tug's engines were at full speed ahead "for the whole time" until the up-bound steamer came. If the *Isis* had been constantly sheering to starboard, this tug would have had to reverse her engines frequently.

The petitioners suggest that the master and the chief officer of the *Iris* gave evidence before the Seeamt that they had had trouble in steering on the way down the river, and they quote two passages from the Seeamt's findings. One of these (appendix, pp. viii and ix) is a purported translation of part of the master's statement to the Seeamt. The petitioners do not point out that the respondent has always denied the correctness of that translation. The original German and both translations appear at R. 459. When correctly rendered, the passage has no significance.

The Seeamt did say, at R. 473, in its findings that

"The vessel tended during the entire passage to swing to starboard," "particularly according to the declaration of Capt. Krueger."

The Seeamt, in this passage, confused the trip *up* to Bremen, after the first stranding, with the trip *down* after the second. On the former occasion, when the twisted rudder stock caused a starboard rudder angle of 45 degrees, the ship did keep sheering to starboard, as well she might (p. 2, *supra;* R. 55-56). But the record of the testimony before the Seeamt (Exhibit A, R. 455-468), which the *petitioners* placed in evidence, contains *nothing whatever* to the effect that the ship had any tendency to sheer on the way

down the river, except when she smelled the bank, etc., at the time of the accident. Captain Krueger testified in this case (R. 72-73) that neither he nor anyone else gave any such testimony before the Seeamt; and, as already stated, the Seeamt record bears him out. The report of the Seeamt, which the Commissioner found (R. 512) was inaccurate, simply confused the two trips. The Commissioner further found (R. 512) that the statements alleged to have been made by Captain Krueger before that body were

"sufficiently contradicted or explained by the captain's thorough examination and cross-examination when his evidence was taken."

The petitioners also seek to base an argument (appendix, p. x) on the remark of the chief officer, who was off duty and asleep at the time of the accident, that

"it surprised me that the *Hoheweg* could not hold the bow of the *Iris*."

As the chief officer said, that remark referred to the accident itself, not to any earlier difficulty (R. 269); and, in fact, during his watch (until 2.30 A. M.), there was no trouble at all in steering (R. 267-268).

At page x of their appendix, the petitioners seek to draw some inferences from the fact that the second officer of the ship was not called. It may therefore be proper to state that he would have been called at Hamburg, if he had been there. He would have been called in this country, if he had been here. Efforts were made to get him, and it was found that he had left on a long voyage to South America. As a matter of fact, the respondent did expect to call him, and regretted its inability to do so. There was no concealment or withholding of testimony.

On the same page, the petitioners say:

"It was the master who the Commissioner found testified untruthfully in relation to the dangerous condition of the rudder."

The Commissioner made no such finding.

There can be no doubt that the Commissioner and the District Court were correct in finding that the *Isis* with her tugs was fit and seaworthy to proceed.

FOURTH.

The decision to send the *Isis* with tugs was a proper one.

The decision was a practical one, to be made by practical men. Their duty was to make it honestly and reasonably. The evidence makes it clear that they did both.

In the petitioners' brief are assertions that the vessel was sent with tugs for the respondent's "own purposes" (p. 3) and "for the respondent's benefit" (p. 33). The implication is quite unfair. Most of the general average expenses of delaying her would have fallen on cargo, and the risk of sending her (if risk there was) was obviously far greater for the ship than for the cargo.

Reichenbacher testified that, in order to repair at Bremen, he would have had to discharge half the cargo, or about 3,000 tons (R. 171-173). They could not get the drydock for a long time, because another steamer had it engaged (R. 172); therefore, they would have had to take her out of the Weser to repair, or else to wait indefinitely. He said that the decision was "to save time and do the best for everybody" (R. 172). At R. 173:

"Q. Is it not the fact that the reason you did not repair the ship at Bremen was because you wanted to save time for the ship? A. No, not alone for the ship but to save the cargo too."

At R. 174, he said:

"Not only to save time, but to leave the cargo in the ship and to take it direct to the place of destination—so as not to take the Hamburg cargo out in Bremen."

And at R. 255:

"My idea was to keep the cargo in the ship and to deliver the cargo as quickly as possible because we were afraid to

take out the whole of the Hamburg cargo in Bremen and get the cargo more or less damaged, because they had heavy logs on deck and wheat and flour, and other things from the West Coast. So we thought that it would be best to leave the cargo in the ship, take it in dock and see what was wrong with the rudder, and we saw that there was nothing worse than that the rudder stem was twisted, so we thought it would be safest for the ship and the cargo to bring the ship to Hamburg and to make it safe in Hamburg."

Mr. Warns testified (R. 249):

"Q. Do you know what the reason was for towing the vessel rather than discharging the cargo? A. Yes, in order to save the cost of discharging the cargo, storing it and reloading it, and in order to avoid the cargo being damaged by those manipulations.

Q. Do you mean by handling in and out? A. Yes."

Mr. Brandt, a leading underwriter, testified (R. 145) that the decision was

"not only for the benefit of the shipowner, but for all interests concerned for the cargo as well, because if it had been necessary to discharge the cargo, quite a lot of expenses would have been incurred."

Eighty per cent. of these general average expenses would have fallen on cargo, not on the hull (p. 3, *supra*). Mr. French—one of the best qualified men in the world on such a subject—agreed with Reichenbacher that half the cargo would have had to be discharged to drydock the ship safely (French, R. 382). If this had been done, cargo would have been loud in its protestations that the ship ought to have been towed to Hamburg and repaired after the cargo had been delivered and that general average expenses ought not to have been incurred. If fire, or some other accident, had occurred, the cargo would have claimed that drydocking the ship and discharging the cargo was a deviation and would have argued that the cargo should not have been exposed to such risks. Cargo occupies the enviable position of taking no responsibility for such decisions and remaining free to criticize them if anything goes wrong.

The question confronting the employees of the respondent here was whether they should detain the ship and its cargo in Bremen for an indefinite period and incur large general average expenses, or do what every man who saw the ship approved, what all of the experts familiar with the River Weser approved, and what the Seeamt approved, namely, send her under her own power, with the assistance of tugs for steering purposes. They had the unanimous advice of competent men, including some who were not their own employees and whose interest as repairmen was to reach a contrary decision. They had the permission of all the underwriters with whom they could communicate, given by the body set up at Hamburg for just that purpose; they had an amount of power in engines and tugs which all the witnesses have considered adequate; and they had an accident because of a piece of clearly erroneous navigation. It was a reasonable decision, fairly and honestly made, and should not be attacked after the event. To put it at its lowest terms, it was fairly within the reasonable choices which were open. Certainly it was not negligence.

FIFTH.

There was no "intervention" by the shipowner which made Section 3 of the Harter Act or the Jason clause inapplicable to the pilot's error in navigation.

1. The facts do not show an intervention by the shipowner.

The inspection of the *Isis* at Bremen and the decision to send her with tugs were acts of the *servants* of the respondent. The decision was made by Reichenbacher, the marine superintendent, in consultation with the captain (R. 166).

The respondent's only actions were (1) sending Reichenbacher to consult with the master; (2) making inquiry through its insurance department to see whether the underwriters had any objection to carrying out the plan tentatively decided on by Reichenbacher and the master.

The petitioners argue as though the "intervention" of the respondent in sending Reichenbacher to advise with the master was a wrongful, rather than a praiseworthy act. In fact, it showed the conscientious care with which the situation was handled. A similar action was considered by this Court in the *Styria*, 186 U. S. 1, where a ship had loaded sulphur at an Italian port for delivery in the United States. Believing that sulphur had been declared contraband by Spain, the master relanded it and sailed. When his vessel arrived in the United States, she was sued by the owners of the sulphur, who alleged that, in relanding it, the master had failed properly to exercise his discretion, and had blindly followed his owner's positive orders. In rejecting this contention, this Court said (p. 20):

"In the case of *Nobel's Explosives Co.* v. *Jenkins* (L. R. 1896, 2 Q. B. 326), just cited, the same facts appeared, namely, that the master consulted the owners of the ship before he acted, but also acted in reference to the duty imposed upon him to take reasonable care of the goods entrusted to him. *The master, in either case, would have acted imprudently if he had not secured the approval of the shipowners,* if it were possible to get it before the emergency was over; and all that can be said is, that there was a *concurrence of judgment* between the ship agents and the master as to what was the proper course to pursue." (Italics ours.)

That was precisely the situation here; the master and the marine superintendent consulted and concurred in judgment.

The petitioners concede (brief, pp. 25, 31) that, if the captain had acted alone and had made an error, it would have been an error in management, within the Harter Act. It makes no difference whether the error is made by the owner's master, or by the owner's marine superintendent. If the situation had arisen in China instead of in Bremen, no one would claim that the protection of the Harter Act was lost, if an erroneous decision had been made by the ship's master or by the shipowner's port captain at the Chinese port. The law is not different because Bremen happens to be near the home port of the vessel, nor because Reichenbacher happened to be stationed at Hamburg rather than elsewhere. The re-

quirement of seaworthiness at the loading port, or due diligence to secure it, is absolute, and the shipowner is responsible if his servants, though competent, make an error; but no case has ever held that the shipowner is absolutely responsible for the correctness of such a decision as is here involved, at an *intermediate* port. As already stated, the very fact that, if made by the master, such an error would be excused under the Harter Act, shows that the owner is not absolutely responsible. Therefore, it is sufficient if a competent man is employed to examine into the case and to decide on the procedure. His error is an error in management. In the case of a corporation, the act of such a servant is not the personal act of the owner, unless the representative is one of the managing officers of the corporation, which Reichenbacher, of course, was not. No one has questioned, and no one can question, the competence of the men who made the examination of the *Isis* at Bremen. If they were competent, then, even if they made an error in their decision, it makes no difference. It was still an error in management.

The analogy of the Limitation Acts shows that, if a competent representative has been employed by the owner to make an inspection, the default of that representative is not the personal default of the owner.

In the *Annie Faxon,* 75 Fed. 312, the Circuit Court of Appeals for the Ninth Circuit held a shipowner entitled to limit liability in a case of boiler explosion where he had employed a competent representative to examine it, even though the examination had not been sufficiently thorough.

In *Quinlan* v. *Pew,* 56 Fed. 111, the Court held that (p. 118):

"even if the owner is chargeable under the statute with privity or knowledge, who permits a ship to sail from a home port without making provision for inspection or proper fitting away, yet he may rest his duty upon any suitable agent and, when he has done this, he may be relieved under the statute, although the agent may be negligent in some particulars."

The Court further held that the intent of the statute was that owners might properly act through agents and be entitled to limitation

"whenever, and so far as they have appointed a suitable representative, be he master, consignee or other agent, to supervise the ship, either at sea or at the home port or otherwise, and either for fitting her away, or navigating her after she is so fitted away."

There are, of course, many other similar cases.

2. Even if there had been intervention by the shipowner at the port of call, errors in management would still be within the Harter Act and the Jason clause.

The petitioners' position appears to be that, even though a vessel has complied with the requirements of the Harter Act and of the Jason clause by being seaworthy on leaving her loading port, still some exception from their benefits is to be implied in the event of a subsequent error in management made, not by the master, but by the owner or by the owner's marine superintendent.

There is certainly no such exception *expressed* in the Harter Act. That Act is merely one of the statutes regulating the liability of shipowners and light is thrown on its interpretation by a consideration of other similar acts, such as the Fire Statute and the General Limitation Act.

The Fire Statute, R. S. 4282, provides that a shipowner shall not be liable for damage by fire, unless such fire is caused "by the design or neglect of such owner." The General Limitation Act, R. S. 4283, gives exemption if the loss occurs "without the privity or knowledge" of the owner. It will be seen, therefore, that Congress has specifically provided in these two statutes that shipowners are not entitled to their benefit, if personally at fault. There is no similar provision in the Harter Act, as regards anything happening after the ship has sailed from her loading port. In this respect, there is a striking contrast between the Harter Act and the other acts referred to. It would be judicial legisla-

tion to insert such an implied exception in the Harter Act—more especially as that Act does make certain specific requirements of the owner.

An argument closely similar to this was approved by this Court in *In re East River Co.*, 266 U. S. 355, where it was held that, since Congress had particularly provided that limitation of liability could not be had as against a claim for seaman's wages, that specific exception excluded any other implied exceptions, such as claims for personal injuries.

It is interesting to contrast the extremely loose construction of the Harter Act which the petitioners advocate in this connection, with the very narrow and technical construction on which they insist in regard to unseaworthiness which causes no damage.

3. Intervention, if any, by the shipowner at the port of call did not affect the applicability of the Harter Act and the Jason clause to the pilot's error in navigation, which was the cause of the accident; but, at most, affected their applicability only to the shipowner's personal act and its direct consequences.

As already shown (pp. 13-14, *supra*), the statutory duty as to seaworthiness imposed by Section 3 of the Harter Act is completely fulfilled by seaworthiness on sailing from the loading port. The owner is then entitled to the statutory exemptions with respect to errors in navigation during that voyage. The voyage is the unit, and what constitutes the voyage is defined in the bill of lading. There is no authority or justification for saying that an error in management by the owner or by its marine superintendent at a port of call destroys the applicability of the Harter Act in respect to all matters—however disconnected—arising at any later period of the voyage.

The contention seems based on confusion in thought. Even if, as matter of policy, an exception were implied in the Harter Act, whereby its exemptions did not cover the personal errors of the owner, it would merely deprive the owner

of his protection *with respect to those acts;* it would not repeal the Harter Act for the rest of the voyage with respect to errors in navigation by a pilot, having nothing to do with the owner's acts. In other words, the owner's acts would merely give rise to a cause of action against him for negligence, to which he could not plead the Harter Act as a defense.

But, if his negligence had caused no damage, he would not be liable. Thus, in the *Malcolm Baxter, Jr.,* 277 U. S. 323, it was held that the owner of an unseaworthy ship was not liable for losses which were not the consequences of the unseaworthiness.

In the *Francis Wright,* 105 U. S. 381. at 387, this Court said:

"If the unseaworthiness was not the proximate cause of the loss, it is not contended the vessel can be charged with the damages."

So, if a shipowner makes an error in management at an intermediate port, and if, by reason of an implied exception, the Harter Act does not apply to that error, still the owner is not liable if his act does not cause damage. The Harter Act will still apply to other errors in navigation or management by the master or pilot.

To illustrate, suppose that a ship has complied with the terms of the Harter Act at the outset of her voyage; that the owner, being himself a pilot, takes charge of her at a port of call and pilots her to sea, and that, through his error in navigation, she has a collision. The owner then leaves the vessel; she proceeds in charge of her regular master; and, a week later, has another collision because of the master's error in navigation. Possibly the Harter Act might not apply to the first collision. It would certainly apply to the second.

In *Union Ins. Co.* v. *Smith,* 124 U. S. 405, at 427, this Court stated an analogous principle, saying:

"In the insurance of a vessel by a time policy, the warranty of seaworthiness is complied with if the vessel be seaworthy

at the commencement of the risk, and the fact that she subsequently sustains damage and is not properly refitted at an intermediate port does not discharge the insurer from subsequent risk or loss provided such loss be not the consequence of the omission."

Assuming, therefore, that the respondent here intervened at Bremen and itself made an error of management, not covered by the Harter Act, in permitting the *Isis* to sail with a 5-degree bend in the tip of her rudder, then it would be liable if that error had caused the ship to strand. But here it is established by concurrent findings that that was not the cause of the stranding. Therefore there is no liability for that. It is established by concurrent findings that the cause of the stranding was the bad navigation of the pilot. To that the Harter Act is a defense, and the Jason clause gives the right to general average contribution.

In effect, the petitioners ask this Court to say:

"There is an implied exception in the Harter Act, whereby, if a shipowner who has complied with the Act at the loading port, makes an error of management at a port of call, which does no harm to anyone, he is thereby deprived of the benefit of the Harter Act with respect to all future occurrences on that voyage."

To state that proposition is to answer it.

The petitioners rely principally on three cases—*The Willdomino*, 300 Fed. 5; *The Waalhaven*, 36 Fed. (2d). 706; *The Valentine*, 131 Fed. 352.

The *Willdomino*, 300 Fed. 5, affirmed by this Court (272 U. S. 718) on the ground that there had been a deviation, was a case of voyage in stages. The steamer took on cargo at Messina, Italy. On her voyage she called at several ports. She did not have on board, when leaving Messina, sufficient coal to carry her to New York, her port of destination. When she left her last European port, her coal supply was still insufficient and, after putting into the Azores because of an accident to her machinery, she again failed to take sufficient coal to carry her through. On leaving the Azores, her master laid her course for New York, although he knew that her

fuel supply was insufficient. In consequence, a few days later, she deviated toward the dangerous coast of Nova Scotia and there stranded. The decision of the Circuit Court of Appeals was put on the ground that the vessel was unseaworthy and that this brought about a deviation. The affirmance by this Court was on the ground of deviation alone. It will be noted that the deviation was directly caused by the lack of sufficient fuel.

The petitioners (brief, p. 29) criticize the Circuit Court of Appeals in this case for saying that, in the *Willdomino,* "the fault arose at the inception of the voyage." The statement was quite correct. The vessel sailed originally with fuel insufficient for the voyage. This deficiency was not made good at the later stages of the voyage, and therefore, on principles already discussed, she was unseaworthy from the beginning.

In the *Waalhaven,* 36 Fed. (2d) 706, a steamer, bound from a German port to the United States, ran out of coal and put into St. John's, N. F. The master could have obtained sufficient coal at St. John's to enable him to reach Norfolk, where he was bound, but his owners, for purposes of economy, ordered him to take only a small quantity and to proceed to Louisburg. On the voyage to Louisburg, the steamer ran into an ice field, resulting in cargo damage. The Court held that proceeding to Louisburg, which was clearly outside of the route, constituted a deviation. The case is clearly not in point here.

In the *Valentine,* 131 Fed. 352, cargo was delivered to a steam lighter to be transported from a pier in Brooklyn to a pier in the North River. The lighter, because of congestion, was unable to tie up there and had to go to another pier for the night. The captain and engineer then left the vessel. Ice floated into the slip, holing the vessel's bottom, and she sank. The fires were banked and her pumps were not working. The Court decided against the owners on the ground of initial unseaworthiness, or, rather, improper manning. The Court said (p. 354):

"The loss in the present case arose from fault in the management of the vessel at Pier 42 (where she was tied up) *but the fault was not initiated there.*"

In the further extract quoted by the petitioners (brief, p. 55), it is said:

"But if the owners of the ship know that on the voyage, or at points intermediate or otherwise * * * the fires will be banked, * * * and that the captain and engineer will go ashore, and the rest of the crew will go to sleep, * * * and that all equipment for avoiding injury therefrom will be rendered useless; and if the owners approve, suffer or connive at such custom or practice, such vessel is not properly manned, * * *."

It is, of course, true that if the owner of a ship *before the inception of the voyage,* either directs, or is aware, that 50 per cent. of the crew will leave her at an intermediate port, so that she will become unseaworthy, she is then not properly manned for the voyage. In the present case, however, the respondent neither gave directions, nor was aware, at the commencement of the voyage, that the *Isis* would leave Bremen with a slight bend in her rudder (assuming that to have been the fact). The cases are so far from being parallel that no real comparison can be made.

Texas & Gulf SS. Co. v. *Parker,* 263 Fed. 864, cited by the petitioners (brief, p. 26), holds that, when a ship sails from her original loading port in a condition unfit to meet a hurricane which it is known she will encounter, she has not fulfilled the requirements of the Harter Act. This is obvious, but quite irrelevant here.

The libelant has also laid stress upon the *Elkton,* 49 Fed. (2d) 700. That case held merely that, when a vessel left her loading port in a condition amounting to unseaworthiness, the shipowner was liable for loss proximately resulting from that unseaworthiness.

The respondent's position is supported by the case of the *Oritani,* 40 Fed. (2d) 522, aff'd 54 Fed. (2d) 1075, quoted at page 27 of the petitioners' brief. That case states that, where the shipowner is not entitled to the benefit of the Harter Act because of his own act (a long acquiescence in a known improper practice), "to recover on this theory it would be necessary to show, first, *that the practice in question was the proximate cause of the loss.*"

So here, if the respondent did anything at Bremen which was outside the shield of the Harter Act, the petitioners must begin by showing that the respondent's act "was the proximate cause of the loss." The Commissioner and both Courts below have found directly the contrary.

Nor is there any justification for saying that, if the shipowner intervenes in person at a port of call, that fact causes the voyage to begin anew for the purposes of the Harter Act and imposes on the owner the obligation of complying a second time with the terms of the Act. If the ship is seaworthy on original sailing, or if due diligence has been exercised to make her so, the owner becomes entitled to the exemptions contained in Section 3 of the Harter Act, *throughout the voyage.* The Act makes its requirements as of the time and place when the ship breaks ground. It cannot, by judicial construction, be made to repeat those requirements at other times and places.

It is surprising that the petitioners suggest (brief, p. 32) that the case of *United States* v. *American Trading Co.*, 66 Fed. (2d) 617, is authority for the proposition that

> "where a voyage is by stages, the owner must fulfill the condition of the third section of the Harter Act at the beginning of each stage."

That was a case of voyage in stages, where the vessel sailed without sufficient fuel for her entire voyage, and where, therefore, she had to take fuel at a port of call. She did not take enough fuel and therefore was unseaworthy *ab initio,* on the familiar doctrine. It was solely with reference to the question of fuel that the Court said that it was her duty to be seaworthy at the beginning of each stage. When a vessel is seaworthy on original sailing, save in one respect, such as fuel, which is to be supplied at a port of call, her owner's duty under the Harter Act is merely to supply, at the port of call, the deficiency which existed when she originally sailed.

The doctrine of voyage in stages is a relaxation, not a stiffening, of the warranty of seaworthiness.

> *The Steel Navigator,* 23 Fed. (2d) 590, 592 (C. C. A., 2d Cir.).

Just the contrary would follow from the petitioners' contention. According to it, every time a vessel called at a coaling port, the full requirements of the Harter Act would have to be met all over again.

The question is wholly academic. The *American Trading* case was one of voyage in stages, and this is not such a case.

SIXTH.

Unseaworthiness or lack of diligence in some detail having no causal relation to the accident does not affect the applicability of Section 3 of the Harter Act or of the Jason clause.

This question is discussed because the petitioners have argued it, but it is believed that it does not arise for decision in the present case.

The *Isis* fulfilled the requirement of initial seaworthiness. The charge of unfitness because of the alleged 5° rudder bend comes up in connection with the call at Bremen and, as shown in the last point, the legal question arising is not whether a failure in seaworthiness or diligence *at the loading port* deprives the shipowner of the benefit of the Harter Act, irrespective of causal connection; it is, Did the shipowner do a negligent act at the port of call which caused damage?—and if so, can he set up the Harter Act as a defense in respect of that act? Both Courts below have answered the first of these questions in the negative, and the second therefore becomes academic. Moreover, even if the owner could not rely on the Harter Act as regards his own personal error, as already shown he would not therefore forfeit it as regards independent errors of the pilot.

Nevertheless, the broader question will be discussed briefly.

Section 3 of the Harter Act provides that, if

"the owner * * * shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied,"

then he shall not be liable for damage resulting

"from faults or errors in navigation or in the management of said vessel."

The petitioners stress the words "in all respects," and insist that it is a condition precedent to exemption that the owner shall prove diligence "in all respects" and therefore, if there has been a failure in *any* respect, whether or not causally connected with the loss, the condition has not been fulfilled.

That is, perhaps, the meaning of the words, if read in a strictly literal and mechanical sense. But, (1) the practical results would be preposterous and utterly destructive of the statute; (2) Congress could not have intended the statute to accomplish absurd and illogical results and, on familiar principles, this Court will not so construe it; (3) the better considered cases in which the subject has been discussed have refused to accept the arguments now advanced by the petitioners, and have held, in effect, that the words "in all respects" mean "in all respects material to the case."

1. The construction of Section 3 advocated by the petitioners would give absurd results and would in effect nullify the Act.

The Commissioner's discussion of the subject (R. 516-520) is excellent. A few illustrations will show the extraordinary and highly technical character of the petitioners' position.

Suppose that a ship strands or is in collision by reason of the master's error in navigation. Her owner claims the benefit of Section 3 of the Harter Act, and gives general proof that she was seaworthy, etc., at the time of breaking ground on the voyage. In the course of the testimony it appears that, when she broke ground, (1) one of her winches was out of order; or (2) a hatch cover had a crack in it; or (3) a rivet was loose in her after deck; or (4) one of the guys supporting her funnel was worn; or (5) she had one less messboy than required; or (6) she had some deficiency in her equipment—such as hawsers, life preservers, etc.; or (7) she

had, in some particular, less food supply than she should have had, or had no lime juice for a long voyage. The deficiency did not have the remotest connection with the stranding or with the collision or with the consequences of either. Yet the petitioners would deny her owner the benefit of the Harter Act if any one of these defects existed. To produce such absurdities by a slavish adherence to literal wording violates all principles of sound and intelligent construction.

This conclusion is reached also in Mr. Frederick Green's article "The Harter Act," 16 Harvard Law Review 157, where the learned author, after considering a similar illustrative case, concludes (p. 167):

"The proviso is whimsical, if for such an irrelevant incident it excludes the owner from an exemption he would otherwise receive."

The shipowner has the burden of proving due diligence or actual seaworthiness at breaking ground. Under the petitioners' view, in order to sustain his burden, he would have to prove diligence, or actual seaworthiness, with respect to every one of the thousands of details of the ship's construction, manning, equipment and supplies. The libelant would be entitled to cross-examine as to every rivet, every rope, every article of equipment and provisions, and every member of her crew. If he could find any deficiency, no matter how completely unrelated to the accident, Section 3 of the Harter Act would not apply. There never has been a perfect ship, any more than there has been a perfect house or a perfect man. Some detail is always open to criticism. But such refinements, which might have appealed to the mediaeval schoolmen, are impossible in practical affairs and the Harter Act should not be nullified by them.

If a blindly literal construction of the Harter Act were to be adopted, then a shipowner who had failed in due diligence as regards some wholly irrelevant detail would be liable for losses caused by any of the other events for which the Harter Act gives exemption, such as "acts of God, or public enemies, or the inherent defect, quality, or vice, of the thing carried"; "insufficiency of package, or seizure under

legal process"; "any act or omission of the shipper or owner of the goods." If this were so, the position of the shipowner would be far worse than it was before the Harter Act was passed.

The petitioners' contention is that principles of cause and effect must be abandoned in dealing with the Harter Act.

The petitioners (brief, p. 10) say:

"The very structure of the third section of the Harter Act clearly indicates that no causal connection need exist between the condition and the exemption. There will rarely be any connection between unseaworthiness and negligence in navigation; and yet due diligence to make the ship seaworthy is made a condition of exemption in respect of negligent navigation."

This shows whither the petitioners' contention leads. It leads them to say that Congress has given exemptions upon certain arbitrary conditions which have no relation, in logic or in reason, to the exemptions. Any construction which involves such a conclusion must be erroneous. In fact, there is the closest causal relation between the condition and the exemption. The condition requires due diligence to make the ship seaworthy and properly manned, equipped and supplied. These requirements are most intimately connected with proper navigation and management, perils of the sea, etc. Indeed, they are absolute essentials. Failure to fulfil them is the direct cause of errors in navigation and management and of injury by sea perils. If the captain is incompetent, if the compass is defective, if the engines will not reverse when ordered, if the whistle cannot be blown in fog, if the ports cannot be securely closed, if the valves of the tanks are defective, the ship will not, and cannot, be properly navigated or managed, and will be injured by sea perils. The theory of the Act is that the shipowner must use due diligence to furnish a ship which can be properly navigated and managed and men who are capable of doing so. The condition is most directly related to the exemption.

An important argument is derived from the history and purposes of the Harter Act. Under the law of England and

of other countries, a shipowner was permitted by contract to exempt himself from liability occasioned by his negligence or by the negligence of his agents. Under the law of this country, this was not permitted. One of the purposes of the Harter Act, as stated by this Court in the *Jason,* 225 U. S. 32, at 53, was to give the shipowner, within certain limits, the same position which the foreign law gave him. The limits imposed were, first, that the shipowner must use due diligence to make the vessel seaworthy and properly manned, etc.; then, that the exemption should extend to perils of the sea, errors in navigation or management and certain other matters. This was remedial legislation, intended to extend the relief afforded the shipowner, and it must be liberally construed so as to effect that purpose.

It must also be construed in the light of the general maritime law. It is settled in England that unseaworthiness, even if a breach of the warranty of seaworthiness, does not render a shipowner liable for damage to cargo, if the damage was not caused by that unseaworthiness.

> *The Europa,* 1908 Pr. Div. 84, 97;
> *Kish* v. *Taylor,* 1912 App. Cas. 604, at 616;
> *Elder, Dempster Co.* v. *Patterson,* 1924 App. Cas. 522, at 536 and 549.

The law of this country is the same. *The Malcolm Baxter, Jr.,* 277 U. S. 323, 331. Therefore, where the parties have made an agreement for exemption with respect to losses caused by perils of the sea, unseaworthiness is immaterial unless it contributed.

In the *Jason,* 225 U. S. 32, at 53, this Court said:

"This language is laid hold of as indicating that the decision proceeded upon the ground that Congress thought it improper to permit owners of vessels to contract for exemption from liability. What it really means, as will be observed, is, that Congress went further, and by its own enactment exempted them from liability, under given conditions, for the consequences of faulty navigation."

The Act is an extension, not a limitation, of the shipowner's exemption.

This Court also said (p. 51) that, by the Harter Act, Congress had

"rendered such agreements unnecessary by repealing the liability itself."

That indicates that the intent was to assimilate the new statutory exemption to the old contractual one. In the case of a contractual exemption with respect to perils of the sea, non-contributing unseaworthiness is immaterial. By the statute, Congress has "rendered such agreements unnecessary." Surely, therefore, the rule is the same under the statutory exemption with respect to perils of the sea.

But the Harter Act gives exemption with respect to several matters: one is perils of the sea, another is error in navigation or management. They are dealt with in the same clause. Surely the rule must be the same as to both, that non-contributing unseaworthiness is not material.

The respondent's position is that the shipowner's duty is to give general proof of seaworthiness or due diligence on breaking ground, and proof of seaworthiness or diligence in all respects *relating to the accident.*

2. A statute should not be construed so as to bring about unreasonable results if any other construction is possible.

In *United States* v. *Katz,* 271 U. S. 354, this Court said (at 357):

"All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

There it was held that an act making it a crime for *any person* to sell liquor without making a record of the sale applied only to dealers licensed under the Prohibition Act.

In *Hawaii* v. *Mankichi,* 190 U. S. 197, the subject was fully discussed. The resolution of annexation of Hawaii provided that its laws should continue in force, in so far as not contrary to the Constitution. It was held that this was

not to be construed to abrogate at once the Hawaiian criminal procedure, even though this procedure did not embody all the constitutional safeguards. This Court, at page 212, quoted with approval from *Smythe* v. *Fiske*, 23 Wall. 374, 380, as follows:

"A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law."

The Court also quoted from *United States* v. *Kirby*, 7 Wall. 482, as follows:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

In *Heydenfeldt* v. *Daney, Gold, etc. Co.*, 93 U. S. 634, 638, this Court said:

"If a literal interpretation of any part of it" (a statute) "would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act, taken as a whole, it should be rejected. * * *"

See, too:

Church of the Holy Trinity v. *United States*, 143 U. S. 457;
United States v. *Ryan*, 284 U. S. 167.

There is an interesting discussion of the subject in *McGrady* v. *Terrell*, 98 Texas 427. There, a statute governing the sale of school lands made certain provisions as to the sale of "all lands which are now or may hereafter become detached lands." This was construed to refer only to surveyed lands, despite the word "all." The Court, referring to *Bivins* v. *Lessee, etc.*, 15 Ga. 521, said (p. 431):

"The Georgia case is very much in point. The question was as to the construction of a statute which used the word 'all' with reference to levies upon property and upon that

statute the court said: 'True, it says, that in *all* cases where a levy is made, etc. One is amazed, in casting a glance over our statute book, to find how often this form of expression occurs, frequently signifying, as here, not absolutely all—but all, of a particular class, only. Indeed, it seems to be common to all writings—lay as well as legal, sacred as well as profane. And the generality of the phrase is frequently to be restrained in an act, not only by the context, but by the general form and scheme of the statute, as demonstrative of the intention of the Legislature. Here it means, in *all cases* where the claimant is in possession of the property, he shall not be deprived of it, but it shall be left with him.'"

In connection with the Harter Act itself, the courts have shown that they will not adhere to literal wording at the sacrifice of common sense. Section 3 of the Act states that the owner is entitled to certain exemptions if he "shall exercise due diligence" to make the ship seaworthy, etc. Literally, this means that, unless he has used due diligence, he may not have the exemptions, even though the ship were *in fact* seaworthy, etc. But this is not the construction given to the Act. In the *Indrani,* 177 Fed. 914 (C. C. A., 2d Cir.), where a suction pipe broke and damaged cargo, it appeared that the pipe had not been inspected for a year. *No* diligence had been used. But, since the pipe was found to have been actually in good condition, the shipowner was held entitled to the benefit of the Harter Act.

The same view was expressed by this Court in *Int. Navig. Co.* v. *Farr & Bailey Mfg. Co.,* 181 U. S. 218, 226, where it was said:

"We repeat that even if the loss occur through fault or error in management, the exemption cannot be availed of *unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised* * * *." (Italics ours.)

3. The better authority supports the respondent's contention.

It is of course obvious that, under the general maritime law, breach of a covenant of seaworthiness is important only

in so far as it causes the damage complained of. In the *Malcolm Baxter, Jr.*, 277 U. S. 323, this Court held that only damages *proximately caused by the unseaworthiness were recoverable*, and said (p. 331):

"Unseaworthiness * * * displaces the contract of affreightment only in so far as damage is caused by the unseaworthiness. *The Caledonia*, 157 U. S. 124; *The Europa* (1908) (p. 84)."

This Court concluded (p. 334):

"* * * that the rule *causa proxima non remota spectatur* applied to contracts of common carriers as to others. There has been no departure from this rule and we see no reason for departing from it now. See *Milwaukee & St. Paul Ry.* v. *Kellogg*, 94 U. S. 469; *Atchison, Topeka & Santa Fe Ry.* v. *Calhoun*, 213 U. S. 1; *The Indrapura, supra; The Lusitania*, 251 Fed. 715, 732; *The Turret Crown*, 282 Fed. 354, 360."

In the *Turret Crown*, 282 Fed. 354, cited by this Court, in the passage just quoted, on the very subject of causal connection, the ship had trouble with her steering gear almost immediately after sailing, and she finally put back to New York. Part of her cargo was discharged there, and was subsequently injured by an extraordinarily high tide. Other cargo had been damaged through leaks in the bottom of the steamer. Despite the fact that the steamer was unseaworthy as to her steering gear, as to which no diligence had been used (p. 359), Judge Ward held that the unseaworthiness had nothing to do with the loss, and that the shipowner was entitled to defend under the Harter Act, saying (pp. 359, 360):

"But the question is whether this unseaworthiness, whose defects were fully developed before water got into the fuel tanks, contributed to the bottom damage which injured the cargo. * * *

If forcing the steamer into the sea, whether a head sea or a following sea, at a speed sufficient to give steerageway did contribute to the bottom damage, it was an error in navigation and management of the vessel, for which the claimant is excused by the Harter Act.

For the damage to cargo when discharged on Pier B, Jersey City, after the return, which was caused by an extraordinary flood tide, I think the ship is not liable. The proximate cause and the *causa causans* was an act of God—the extraordinary high tide."

On appeal (297 Fed. 766), it was found that the unseaworthiness did directly contribute to the damage, and on that ground the decree was reversed, but the above statement of the law was not criticized. On the contrary, the Court said (p. 782):

"This Court has held that the *Turret Crown* was unseaworthy. Her owners are responsible for all damages resulting from such unseaworthy condition."

In the *Turret Crown*, 284 Fed. 439, another litigation growing out of the same voyage, the Circuit Court of Appeals for the Fourth Circuit referred to Judge Ward's opinion, already quoted, and said (pp. 444, 445):

"If we accept, as we are disposed to do, his findings of the facts in this regard, it would seem to follow, of course, that, there being no causal relation between the unseaworthiness and the damage, no advantage may properly be taken of the former."

In the *Thessaloniki*, 267 Fed. 67 (C. C. A., 2d Cir.), large quantities of water entered a steamer, and she was abandoned and became a total loss. The Court exonerated her owner from liability and said (p. 70):

"We think it quite incredible that a valuable steamer and cargo would have been abandoned within 300 miles of New York, if they were not past saving. However, had this been the case, it would have been an error in the navigation and management of the vessel, for which the owners would not be liable under the Harter Act, if they had exercised due diligence to make her seaworthy.

The only charges of unseaworthiness in the pleadings and in the proofs are connected with the boilers, engines, and sounding pipes. We may assume them all to be established, and the only result would be delay in the prosecution of the voyage."

It was held that this unseaworthiness, which did not contribute to the loss, did not prevent the owners from relying upon the Harter Act.

The three decisions last referred to were all cited as authoritative by this Court in the *Malcolm Baxter, Jr.*, 277 U. S. 323.

In *Rosenberg* v. *Atlantic Transport Co.*, 25 Fed. (2d) 739, the Court said (p. 741):

"If she was unseaworthy in respect to the chain locker construction, respondents cannot avail themselves of perils of the sea or mismanagement as defenses under the Harter Act, unless they can show that the damage would have occurred *despite the existence of the factor of unseaworthiness* (citing cases)."

The question was squarely decided by the Circuit Court of Appeals for the Second Circuit in *Hartford & New York Trans. Co.* v. *Rogers & Hubbard,* 47 Fed. (2d) 189, 192, known as the *Spartan.* The Court made its decision alternatively, that either (1) the flotilla there involved was seaworthy at the commencement of the voyage, or (2) if unseaworthy, the unseaworthiness had no connection with the loss. The Court held that, on either hypothesis, there was no liability for the cargo damage, and the shipowners were allowed to recover general average. Certiorari was denied by this Court (283 U. S. 835).

In the later decision of the *Elkton,* 49 Fed. (2d) 700, the Circuit Court of Appeals indicated that the matter was still open. In that case, the question did not arise for decision, and the discussion is pure dictum, for initial unseaworthiness was there involved.

Thereafter, in the present case, the Circuit Court of Appeals reaffirmed its decision in the *Spartan* (R. 562; 63 Fed. [2d], at 251).

This Court has indicated that it holds the same view. In the *Wildcroft,* 201 U. S. 378 (*supra,* p. 15), this Court, in affirming a decree in favor of the shipowner, said (p. 387):

"As we understand the findings of both the District Court and the Court of Appeals, the testimony in this regard introduced by the shipowner was sufficient, in the judgment of those courts, to establish that the vessel was seaworthy *in the respects involved,* and that an inspection had been had, and the valves and connections, *the negligent use of which was productive of this injury,* found in due order at the beginning of the voyage. This finding of two courts will ordinarily not be disturbed, and is usually accepted by this court as conclusive." (Italics ours.)

Of the cases cited by the petitioners, the *Willdomino,* 300 Fed. 5, does contain language tending to support the petitioners' view; but, when the case reached this Court, it was decided on wholly different grounds (272 U. S. 718).

The *River Meander,* 209 Fed. 913, a decision in the District Court in New York, was overruled by the later decision of the Circuit Court of Appeals in the *Spartan* (p. 59, *supra*).

In the *St. Paul,* 277 Fed. 99, a ship which had only coastwise papers, loaded cargo for a foreign voyage, which she could not lawfully make and for which she was consequently unseaworthy. She was libeled for repairs and other claims, remained in the Marshal's custody for many weeks, and finally caught fire and sank. The District Court held, quite correctly, that she had violated her contracts of carriage and was liable; and that the Harter Act was no defense, pointing out that the Act's exemption from losses arising from "seizure under legal process" did not permit her to claim exemption for her own breach of contract. There, her very unseaworthiness in respect to papers made it impossible for her to carry out her contract. The Court said (p. 107);

"When, therefore, in this case, the marshal seized the vessel, it still remained the duty of the owner to carry out his contract of affreightment. This, by virtue of his own wrong, he was at no time able to do."

Obviously, he could not defend under the Harter Act. His own violation of it caused his inability to sail.

The petitioners cite *In re O'Donnell,* 26 Fed. (2d) 334, and the *R. Lenahan, Jr.,* 48 Fed. (2d) 110, cases where cargo on barges in tow of tugs was damaged, in one case by collision and in the other by stranding, and where it was held that tug and tow were one vessel for purposes of the Harter Act, and that the proof as to seaworthiness or due diligence must cover both. These decisions are correct but irrelevant. In both, the suits were for damage to cargo, and questions of the soundness of the barges and of their proper manning and equipment might well play an important part in the liability. These cases were both in the Second Circuit, where the law on the subject under discussion has been settled by the *Spartan,* 47 Fed. (2d) 189, a decision of the same Court which decided the *O'Donnell* and the *Lenahan* cases.

Reference is also made to *Louis-Dreyfus et al.* v. *Paterson,* 43 Fed. (2d) 824, where cargo was carried from the port of loading to a port of transshipment and thence transferred to another vessel which stranded. The Court's remarks appear to be dicta; but it would seem that the view that, where two vessels act as connecting carriers and the second strands, it is necessary under the Harter Act to prove seaworthiness on the part of the *first* vessel, which has performed her part of the carriage and has safely delivered the cargo to the second vessel, is not a reasonable view. In fact, however, the Court did not express this view; it merely said (p. 826) that, if the connecting vessels were regarded as one for the purpose of arguing that the voyage was to or from a port of the United States, then it would follow logically that the seaworthiness of both would have to be proved.

The District Court decision of *Merklen* v. *Johnson & Higgins,* 3 Fed. Supp. 897, is based upon a quite unjustifiable attempt to distinguish between the meaning of the language of the Jason clause and the meaning of the very same language in the Harter Act (p. 10, *supra*).

In the *R. P. Fitzgerald,* 212 Fed. 678, the Court held merely that, since a compartment where kerosene was to be kept was so constructed that the kerosene could leak on the cargo, if it escaped from the can, the vessel was not seaworthy.

There was causal connection. The Court said that the question was one of seaworthiness, rather than of "relative operating causes," but nowhere suggested that the Harter Act would have been inapplicable if there had been no connection whatever between the unseaworthiness and the damage.

The *Indien,* 1933 Am. Mar. Cas. 1342, was a case in which the Court correctly held that the shipowner had the burden of proof as to due diligence and declined to speculate on the consequences of overloading a vessel.

The shipowner must give proof of initial seaworthiness or of due diligence, but, if it appears that there was some detail in which his ship was not perfect but which did not contribute to the accident, it would be quite unreasonable to deprive him of the protection of the Harter Act.

It is urged that every consideration of reasonable construction of the statute supports the respondent's contention; and that it is also supported by the weight of authority, including the expression of this Court, quoted above (pp. 59, 60), in the *Wildcroft,* 201 U. S. 378.

SEVENTH.

The decree below should be affirmed.

New York, November 9, 1933.

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APPENDIX A.

The evidence fully supports the concurrent findings below that the stranding was caused by the pilot's negligent navigation.

The *Isis* left the point indicated on the chart, Exhibit 9, near kilometer 6, at 2.11 A. M. (R. 75). She passed the upbound vessel, at about kilometer 17, at 3.40 A. M. (R. 65, 77). Consequently her average speed was about 7½ kilometers, or, as the master thinks (R. 64), about 8 kilometers, over the ground. This equals about 4.3 knots. There was a flood current of some 3 kilometers (R. 64), and the speed through the water was therefore about 11 kilometers or 5.9 knots.

The engine maneuver book is in evidence as Exhibit 7. A translation of the entries for the material period is printed herein as Appendix B (pp. v-vi). The original pages are reproduced in the record, but, unfortunately, bound in the wrong order. The correct order of the pages is 496C, 496B, 496A.

The river curves to port at kilometer 17. When the *Isis* was near kilometer 16, she saw, around the bend, another steamer bound up (Krueger, R. 65). Instead of checking the ship's headway and passing this steamer in the straight reach, the pilot continued at the same speed, which, as the Commissioner justly says (R. 515), was probably more than the average had been up to that time. The maneuver book shows that, for four minutes preceding the passing of the other steamer at 3.40, both of the ship's engines were going either slow or half ahead (transcript of maneuver book, p. vi, *infra*). The master of the starboard tug testified before the Seeamt (Zey, R. 466) that his tug's engines were going full ahead until they were passing the steamer. Klaasen, master of the port tug, testified before the Seeamt (R. 466) that his engines were going full ahead when the steamer was passed, and his testimony in this case (R. 179) was:

"The engines were left at full speed for the whole time until the opposite steamer came up."

In order to pass the other steamer, the pilot directed the course of the *Isis* to starboard. For this purpose, he reversed the engines of the starboard tug at full speed (Zey, R. 466) keeping those of the tug on the port side at full ahead. Klaasen testified (R. 179):

"Q. How were the engines on your tug working when you passed the steamer? A. Full speed ahead."

With one tug going full ahead and the other full astern, the ship of course swung sharply, and, as she swung, the strong up-current struck her on the port bow, especially since the river was then curving to port. She was carried close to the bank—"too close" (Krueger, R. 66).

The tugs tried to straighten her up (R. 66, 112, 465, 466) but could not do so because she was "smelling the bank," as Captain Davis, a highly qualified expert, testified that ships are apt to do when they get too close (R. 418):

"By the Commissioner.

Q. What is the effect of a steamer going down a river such as this getting too close to the bank at the edge of the channel? A. Well, to use a sailor's phrase, she smells the bank and goes right for it."

The steamer continued to get closer to the bank on the Lesum, or starboard side, and the starboard tug let her lines go to avoid being crushed.

Krueger (R. 66):

"A. Well, when we came close to the Lesum bank, we were so close, he (the starboard tug) couldn't get clear of that bank so he let go his lines and went away.

Q. That left you then with only the port tug and the tug ahead? A. Yes.

Q. What did they do? A. Well, they tried the best they could but they couldn't get us back to the center of the channel."

Therefore, the starboard tug was lost when she was most needed.

Just below was a buoy, on the starboard edge of the channel. The pilot was afraid to use his starboard engine, fearing that the propeller would get entangled in the buoy chain. Consequently he stopped the starboard engine (Krueger, R. 67, and see R. 102).

All this time the leading tug was pulling sharply off to port in an attempt to straighten the ship out, and the port tug was reversed, but, as the tug master testified (Seeamt, R. 465, 466), the ship would not come back, but kept turning farther off towards the Lesum until she ran ashore on the point separating the two rivers.

Captain Krueger testified that he passed the upbound steamer about one-quarter of a mile from the point of stranding (R. 121). The captain's testimony was approximately correct; measured on the chart, the distance is shown to be about 2,000 feet—not 2,400 feet or 4/10ths of a mile, as stated in the libelant's brief.

The entire maneuver was bungled. The *Isis* ought not to have undertaken to pass the upbound vessel on the bend in view of the tidal conditions. The testimony shows—and, indeed, it is obvious without testimony—that it would have been perfectly simple for the tugs to check the steamer's headway and to hold her in position against the flood tide on the straight reach until the upbound vessel had passed. In the case of the *Royal Mail Steam Packet Co. v. Com. Lloyd Brasileiro,* 50 Fed. (2d) 207 (aff'd without opinion, 55 Fed. [2d] 1082; cert. denied, 287 U. S. 607), in the River Scheldt, a local regulation required precisely this maneuver and the steamer was held in fault for not obeying it and holding back so as to pass in the straight reach. This would have been the prudent way to handle the situation, no matter whether the ship was using tugs or had her own rudder (Krueger, R. 68, 69, 97; Davis, R 402, 403; Huseby, R. 429). The experts Captain Davis and Captain Huseby both point out (R. 402, 428, 429) that a ship can be handled in such a maneuver at slow speeds by tugs much better than by her own rudder. If this course had been adopted, there would have been no trouble.

It is obvious that it was bad judgment to sheer the ship close to the starboard bank where the river was curving to port and where the current would necessarily strike her on the port bow, and cause her to continue to sheer. It is not at all surprising that, when the ship got close to the bank, she would not come back; and when, a few moments later, the starboard tug cast off and the starboard propeller could not be used, the situation became hopeless.

It was not necessary for the pilot to navigate close to the bank at all. The *Isis* and her tugs together were about 100 feet wide. The channel was 100 meters, or about 320 feet wide. If the pilot had left 75 feet between the starboard bank and his starboard tug, that would have left 145 feet for the upbound steamer, which would have been more than ample.

The pilot should also have reduced his speed down practically to nothing. The head tide would have given him ample steerageway, even if he had been making no headway over the bottom.

The pilot also neglected to use the ship's engines properly. As the maneuver book shows, he never put the starboard engine full ahead—the obvious method of turning the ship back to port. The port engine was reversed momentarily at 3.40, but after that was not reversed again until 3.46, and was not reversed at full speed until 3.50, after the ship's stern had already struck and very shortly before she brought up.

In narrow channels against a strong current, ships must be handled properly when rounding a bend, and failure so to handle them has always been held to be negligent.

> *The City of Birmingham*, 138 Fed. 555, at 556;
> *Christie* v. *Fave SS. Co.*, 159 Fed. 648, at 650;
> *The Polynesien*, 10 Pr. Div. 28, at 34.

As Captain Krueger points out (R. 69), precisely the same result would have followed from such navigation even if the *Isis* had had the full use of her own rudder.

It seems unnecessary to argue the facts more fully. There is not the slightest basis for questioning the findings of the Commissioner and of the two Courts below on this subject.

APPENDIX B.

Translation of Engine Maneuver Book.

ISIS BELL BOOK

February 10, 1928

A. M.	*Port Motor*	*Starboard Motor*
	* * *	* * *
2.10	Reverse half. Stop.	Ahead slow.
2.11	Ahead slow.	
2.12	Stop.	Stop.
2.15	Reverse half.	
2.17	Stop.	
2.18		Reverse slow.
2.19		Stop.
2.22	Reverse slow.	
2.23	Stop.	
2.24	Ahead slow. Stop.	
2.25		Ahead slow.
2.26		Stop.
2.27		Ahead slow.
2.28		Stop.
2.29		Ahead slow.
2.30		Stop.
2.32		Ahead slow. Stop.
2.35		Ahead slow.
2.36		Stop.
2.37		Ahead slow.
2.38		Stop.
2.39		Ahead slow.
2.40	Ahead slow. Stop.	Stop.
2.41		Ahead slow.
2.42		Stop.
2.42		Stop.
2.43	Ahead slow. Stop.	
2.44	Reverse half.	Ahead slow.
2.45	Stop.	Stop.
2.46	Ahead slow. Stop.	
2.50		Ahead slow.
2.51		Stop.
2.53	Ahead slow. Stop.	
2.54		Ahead slow.

A. M.	*Port Motor*	*Starboard Motor*
2.55		Stop.
2.57		Ahead slow. Stop.
3.4		Ahead slow. Stop.
3.8		Ahead slow.
3.9		Stop.
3.12		Ahead slow.
3.13		Stop.
3.14		Ahead slow.
3.15		Stop. Ahead slow.
3.16	Ahead slow.	Stop.
3.17	Ahead slow. Stop.	Reverse slow. Stop.
3.18	Reverse full. Stop.	Ahead slow. Ahead half. Stop.
3.20	Ahead slow.	
3.21	Stop.	
3.25	Ahead slow. Stop.	
3.26		Ahead slow. Stop.
3.27		Ahead slow. Stop.
3.32	Ahead slow. Stop.	
3.33		Ahead slow.
3.34		Stop.
3.35		Ahead slow.
3.36	Ahead slow.	
3.37		Ahead half. Ahead slow.
3.39		Ahead half. Ahead slow.
3.40	Stop.	
	Reverse half. Stop.	Ahead half.
3.41	Ahead slow.	Ahead slow. Ahead half.
3.42	Stop. Ahead slow.	Ahead slow.
3.43	Ahead half	Ahead half.
	Ahead slow.	
3.45	Stop.	
3.46	Reverse half.	
3.47	Stop. Ahead slow.	Ahead slow.
3.49	Stop.	Stop.
3.50	Reverse full.	Ahead slow.
3.51		Stop.
3.53	Stop.	Reverse full. Stop.

* * * * * *

APPENDIX C.

The alleged bend in the rudder blade had no effect on the navigation of the *Isis*.

Undoubtedly the Commissioner was right (R. 523-524) that by far the most qualified witnesses on this subject were the three experts called by the respondent. Captain Davis is constantly dealing with such questions from the standpoint of the practical handling of vessels; Mr. French is constantly doing so from the standpoint of issuing certificates of seaworthiness; and Captain Huseby is constantly handling vessels with tugs, and observing what effect a ship's rudder has when used under such conditions. They all agree that, at the speed at which the *Isis* was traveling—say 6 miles per hour through the water—a 5-degree bend at the tip of her rudder would have no practical effect.

This finding by both Courts below is fully supported by common sense, as well as by the testimony of the experts. Mr. French testified (R. 380, 387) that such a bend would not have any substantial effect upon the navigation. He referred to the case of the steamer *C. O. Stillman*, which navigated for six months with a similar bend of the rudder. It did not have the slightest effect on her navigation, and no one on board knew that it existed (R. 380, 381, 387, 388). The libelant's witness McLennan, refers to similar cases (R. 320, 321). Mr. French is constantly passing on questions of seaworthiness and is as competent as any man in the world.

At R. 395:

"I don't think, with a loaded ship like that, 5 degrees would have affected anything going down with those two boats steering at the speed the ship would be going."

He testified (R. 391, 395, 396) that he would not have hesitated to give the *Isis* a certificate of seaworthiness to proceed with the three tugs, and said:

"I don't think 5 degrees would interfere any at all."

This was especially true of the *Isis*, with her powerful tugs and her twin screws.

Captain Davis, whose qualifications no one has questioned, testified that he considered the vessel safe for the trip (R. 400, 402) and that, if there were a bend in the rudder which affected the steering of the ship, her navigators would have discovered it before she had proceeded any substantial distance (R. 412, 417), "as soon as they had the speed on the ship they were going to navigate it (at)" (R. 414).

Captain Huseby testified (R. 432, 433) that he considered the ship fit and (R. 451) that such a bend in the rudder

"would not make any difference in my opinion, in my opinion it would not make any difference."

He testified that a ship has to have 3½ or 4 knots of speed before the rudder will affect her at all (R. 453-454):

"You can go along with say 3½, that is just about steerageway, then you have to have your wheel hard over before she answers at all, so in my opinion, say 5 or 6, 8 or 10 degrees, it would be so little you couldn't feel it, of course, it all depends how fast your ship is going. * * *"

If she were going at 8 kilometers, or between about 5 knots, "it would not affect her" (R. 454). At 6 knots, she would have to have 10 degrees of helm before she would feel it (R. 454).

The petitioners' witness McLennan (R. 320, 321, 322) admitted that, if the rudder were bent enough to affect the steering, it would be noticed. The petitioners' witness Jordan admitted that, if the boat had been navigated for several miles without trouble, it would show that the rudder was all right (R. 352). The petitioners' third expert, McGregor, admitted that a bend

"under 5 (degrees) I would not consider worth noticing very much" (R. 358).

The Commissioner heard and saw the expert witnesses on both sides. Basing his opinion partly on the personal impression made on him by the witnesses, he accepted the opinion of the respondent's experts.

No one can read the account of the way in which the ship was swept by the current and believe that a minute bend in the bottom of the rudder, even if it existed at the time, had anything to do with it. There was no difficulty in steering the ship going down the river (pp. 32-33, *supra*); she did not tend to sheer to starboard; and there was no trouble whatever, until she was intentionally and negligently swung to starboard at the beginning of the river bend, so that the current came on her port bow, and she then lost the benefit both of her starboard tug and of her starboard propeller.

The petitioners argue that two of the respondent's witnesses admitted that they would not have allowed the vessel to sail if they had known of this bend. The testimony in question has been misinterpreted.

Captain Reichenbacher, the marine superintendent, testified merely that, generally speaking, he would not allow a ship to sail with a bent rudder. His evidence was (R. 254):

"Q. Are you satisfied from your examination that the rudder blade was straight? A. Yes. I would never undertake a thing like this if I knew the rudder blade was bent. I would not have ordered her to be sent to Hamburg if the rudder blade was bent. I would have ordered her to be put into dry dock at Bremen."

That is a long way from being a statement that a 5-degree bend at the tip of the rudder was a dangerous thing.

Captain Krueger testified that he examined the rudder and found it straight. At R. 94, 95 he was asked by petitioners' counsel:

"Q. If you had known that the rudder had the bend, at the time you left Bremen, which was later discovered at the time it was in drydock after the second stranding, I take it that you will agree with me that you would not have sailed? A. No.

Q. The reason why you did sail from Bremen with your rudder lashed and with the use of your tugs and your ship's engines was based on the belief that the blade of the rudder was straight and in no way bent? A. Yes."

These last two answers, consisting of only "no" and "yes," can hardly be said to prove that a 5-degree bend at the extreme tip of the rudder would have made the *Isis* unfit to tow.

The same argument was made to the Commissioner. He said (R. 524-525):

"My own inference from this evidence is that these two witnesses merely overdid an effort to establish a character for caution. In spite of what they say, it is extremely difficult to believe that they really would not have sent the *Isis* on her voyage under tow, even if they had known of a 5° deflection in her rudder blade."

Moreover, even if, through an excess of caution, the witnesses would not have sent the vessel out with a 5-degree deflection at the tip of the rudder, it does not follow that such a deflection would have been dangerous. Neither Reichenbacher nor Krueger said that there would have been any danger about it, especially with the twin screws and powerful tugs, capable, if properly navigated, of handling the ship with the utmost ease; and the expert evidence makes it abundantly clear that there was no danger. The trifling deflection of the blade, even if it existed at the time in question, was of no more importance than a scratch in the paint would have been. The petitioners are catching at a straw.

The findings below that the bend, if present, was of no consequence, based, as they are, on adequate evidence, are conclusive here.